

The Report of the Working Group on Human Remains

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Contents

Chapter

- 1 Establishment and terms of reference
- 2 Human remains in English museum collections
- 3 Origins and destinations
- 4 Evidence submitted to the Working Group
- 5 Progress and parallels
- 6 Contemporary law in England and Wales
- 7 Consent
- 8 Associated objects
- 9 Ethics, principles and obligations
- 10 The problems requiring solution
- 11 Resolving the conflict
- 12 Recommendations
- 13 Statement of dissent from Neil Chalmers

Appendix

- 1 Powers of disposal for museums
- 2 Law on human remains in museum collections – a working survey
- 3 Repatriation of Human Remains and the Human Rights Act
- 4 Case summaries relating to human remains
- 5 International Agreements
- 6 Professional and Institutional Approaches to Human Remains
- 7 Terms of reference
- 8 Draft Code of Practice for the Treatment, Care and Safe Keeping of Human Remains in English Museums and Collections
- 9 Working Group on Human Remains submissions
- 10 The Native American Graves Protection and Repatriation Act (NAGPRA): A detailed analysis

Chapter 1: Establishment and terms of reference

Establishment, membership and background

1. The Working Group on Human Remains in Museum Collections (Working Group) was established in May 2001 by the then Minister for the Arts, the Right Honourable Alan Howarth CBE MP, under the chairmanship of Norman Palmer, Barrister, Professor of the Law of Art and Cultural Property at University College, London, Chairman of the Illicit Trade Advisory Panel, Chairman of the Treasure Valuation Committee, with the following terms of reference:

- to examine the current legal status of human remains within the collections of publicly funded museums and galleries in the United Kingdom;
- to examine the powers of museums and galleries governed by statute to deaccession, or otherwise release from their possession, human remains within their collections and to consider the desirability and possible form of legislative change in this area;
- to consider the circumstances in which material other than, but associated with, human remains might properly be included within any proposed legislative change in respect of human remains;
- to take advice from interested parties as necessary;
- to consider the desirability of a statement of principles (and supporting guidance) relating to the care and safe keeping of human remains and to the handling of requests for return; if the Working Group considers appropriate, to draw up the terms of such a statement and guidance; and

- to prepare a report for the Minister for the Arts and make recommendations as to proposals which might form the basis for a consultation document (to be used for consultation under the Regulatory Reform Bill).¹

2. The decision to set up the Working Group followed recommendations made in a report on *Cultural Property: Return and Illicit Trade*, by the Select Committee on Culture, Media and Sport (Select Committee), published in July 2000.² That report recommended that:

- there should be discussions with a view to preparing a statement of principles and accompanying guidance relating to the care and safe keeping of human remains and to requests for return;
- there should be better access to information on holdings of human remains; and
- the Department for Culture, Media and Sport (DCMS) should undertake a consultation exercise on the terms of legislation to permit the trustees of national collections to remove human remains from their collections.

3. The Government welcomed the Select Committee's recommendations, but felt that, prior to any consultation, it would be helpful for the Working Group to examine the whole issue comprehensively.

4. A further event leading to the establishment of the Working Group was a meeting between the Prime Minister of Australia, John Howard, and the UK Prime Minister, Tony Blair, in London in July 2000. After that meeting the following statement was issued:

¹ Since enacted as the Regulatory Reform Act 2001. See generally paras 279, 462.

² Seventh Report of the House of Commons Select Committee on Culture Media and Sport, *Cultural Property: Return and Illicit Trade* (18 July 2000) paras 153-166, 199 (xiv)-(xvi).

The Australian and British Governments agree to increase efforts to repatriate human remains to Australian indigenous communities. In doing this, the Governments recognise the special connection that indigenous people have with ancestral remains, particularly where there are living descendants.

The Australian Government appreciates the efforts already made by the British Government and institutions in relation to assisting the return of human remains of significance to Australian indigenous communities. We agree that the way ahead in this area is a cooperative approach between our Governments. Our Governments recognise that there is a range of significant issues to be addressed in order to facilitate the repatriation of indigenous human remains. Addressing these issues requires a coordinated long-term approach by Governments involving indigenous communities and collecting institutions. Consultation will be undertaken with indigenous organisations as part of developing any new cooperative arrangements.

Significant efforts have already been undertaken by individuals and particular organisations in this area. More research is required to identify indigenous human remains held in British collections. Extensive consultation must also be undertaken to determine the relevant traditional custodians, their aspirations regarding the treatment of human remains and a means for addressing these.

The Governments agree to encourage the development of protocols for the sharing of information between British and Australian institutions and indigenous people. In this respect we welcome the initiative of the British Natural History Museum which has catalogued the 450 indigenous human remains in its collection and provided this information to the Australian Government.

We endorse the repatriation of indigenous human remains wherever possible and appropriate from both public and private collections. We note that several British institutions have already negotiated agreements with indigenous communities for

the release of significant remains. In particular, Edinburgh University, following extensive consultation with the Australian Government and indigenous organisations, has recently completed repatriation requests of a large collection of remains.

Our Governments look forward to continuing to address this issue in a cooperative and constructive spirit.

5. The membership of the Working Group was:

- Mr Tristram Besterman, Director, The Manchester Museum, and former convener, Museums Association Ethics Committee;
- Sir Neil Chalmers, Director, The Natural History Museum;
- Dr Maurice Davies, Deputy Director, Museums Association;
- Mrs Hetty Gleave, Solicitor, Hunters, and Chair, ArtResolve;
- Sally MacDonald, Manager, Petrie Museum of Egyptian Archaeology, University College, London;
- Dr John Mack, Keeper of Ethnography, The British Museum;
- Professor Sir Peter Morris, Nuffield Professor of Surgery at the University of Oxford and President of the Royal College of Surgeons;
- Professor Patrick O’Keefe, Adjunct Professor, Research School of Asian and Pacific Studies, Australian National University;

- Dr Laura Peers, Lecturer in Ethnology and Curator of the Pitt Rivers Museum, University of Oxford; and
- Professor Dame Marilyn Strathern, Professor of Social Anthropology at the University of Cambridge.

Professor Caroline Forder, Professor of European Family Law, University of Maastricht, was a member of the Working Group between May 2001 and July 2001.

6. The Working Group met on 16 occasions and invited evidence, receiving 47 written submissions and nine oral submissions. A list of the organisations and individuals who made these submissions appears as Appendix 9. All written evidence is available on the web at http://www.culture.gov.uk/cultural_property/wg_+human_remains.htm.

Meetings with representatives of other governments

7. The Hon Philip Ruddock, (then) Minister for Immigration and Multicultural and Indigenous Affairs accompanied by HE Mr Michael L'Estrange, the Australian High Commissioner, and by members of the staff of the High Commission, visited the DCMS on 11 December 2001 and was received by the Minister for the Arts and the Chairman of the Working Group, at a meeting at which the work of the Working Group was discussed.

8. Mr Martin Matthews, the Chief Executive of the New Zealand Ministry for Culture and Heritage, and Mr Rob Hole from the New Zealand High Commission, sat in as observers for the first part of the fifth meeting of the Working Group.

Other consultation

9. In the course of a visit to Australia in 2002, the Chairman accepted invitations to discuss the work of the Working Group with the UK Deputy High Commissioner, the Federal Minister for Immigration and Indigenous Peoples, the Commissioner for

Tasmania of the Aboriginal and Torres Strait Islander Commission (ATSIC), the Legal Adviser to ATSIC and other officers, members of the Tasmanian Aboriginal Centre Inc (TAC), officials of the Commonwealth Government, officers of the Australian Museum and other museums, and Justice Alan Goldberg of the Federal Court of Australia at Melbourne. He travelled to Canberra, Hobart, Melbourne, Sydney and Brisbane, and visited sacred Aboriginal sites in Tasmania at the invitation of Tasmanian Aboriginal people.

10. In October 2002, the Chairman accepted an invitation to discuss the work of the Working Group at the Australian High Commission in London, with Mr Wayne Gibbons PSM Chief Executive of ATSIC, and Mr Richard Andrews, Counsellor and Head of the Trade Policy Branch at the Australian High Commission in London.

11. In April 2003, the Chairman, in company with Richard Andrews, held discussions with Rodney Dillon, the Commissioner for Tasmania of ATSIC, and other representatives of Australian indigenous peoples, during meetings held at the Australian High Commission in London and at the Royal College of Surgeons on the occasion of the return by the College of human remains to those representatives.

12. In July 2001, the Chairman led a seminar on the work of the Working Group at the Australian National Gallery at Canberra.

13. In February 2002, the Chairman lectured on the work of the Working Group at the University of Tasmania at Hobart.

14. In September 2002, the Chairman, Sir Neil Chalmers and Dr Maurice Davies spoke on the work of the Working Group and related matters at the Museums Association annual conference at Manchester.

15. In the course of a second visit to Australia in February 2003, the Chairman had further discussions with the UK Deputy High Commissioner, the Federal Minister for

Immigration and Indigenous Peoples, the Commissioner for Tasmania of ATSIC and others.

16. On various occasions between 2001 and 2003 the Chairman met the Chair of the Retained Organs Commission (ROC) and officials of the Department of Health to discuss matters of common interest.

Research

17. Research studies were undertaken by several members of the Working Group on the following areas:

- information and other gains from retention of human remains;
- arguments for and circumstances favouring restitution or relocation;
- UK institutional treatment of contemporary human remains;
- alternatives to compelled physical relocation; and
- volume: size and distribution of collections; measurement; resource implications.

18. The Working Group commissioned a survey of the extent of holdings of human remains in England, and obtained expert legal advice on the implications of the Human Rights Act 1998 for the handling of requests for return. Further details of these studies are given in Chapters 2 and 6 and Appendix 3.

Definitions

19. The Working Group decided that ‘human remains’ should be understood as including all forms of human material and should be specifically taken as including:

- osteological material (whole or part skeletons, individual bones or fragments of bones, teeth);
- soft tissue including organs, skin, hair, nails etc (preserved in spirit or wax or dried/ mummified);
- slide preparations of human tissue;
- artefacts made wholly or largely from any of the above.³

The Working Group decided to exclude human fossils and sub-fossils from its consideration of human remains.

20. The following terms have been used throughout the Report:

- ***source communities or communities of origin***: communities from which human remains originated.
- ***indigenous peoples/indigenous communities***: following work on the United Nations draft declaration on the rights of indigenous peoples, we define these peoples as distinct cultural groups having a historical continuity with precolonial societies that developed on their territories. These peoples may (or may not) form minority and often marginalised sectors of society within larger nation-states. The indigenous peoples to whom we most frequently refer in this Report are Aboriginal peoples of Australia and related areas, Maori of New Zealand, First Nations of Canada, and Native Americans.
- ***relatives and genealogical descendants***: biological, social, and adoptive kin or family. Persons who define themselves by a demonstrable social or biological

³ As to artefacts that are not made wholly or largely from human remains, see generally Chapter 8.

relation to the deceased which they express as a form of kinship. The tie may be demonstrated through birth, marriage, adoption, family membership, or some other arrangement through which the parties share a close identity of a kinship kind, either within or across generations.

- ***cultural descendants***: persons of the same cultural group or who are the common descendants of an historical culture, even though they may not have or recognise family ties. Such individuals are bound together through the distinctive nature of their practices and values, which may include a name (or set of names) or language or tradition or heritage, or other common reference points. These reference points may be of variable time depth, but inheriting and practising them gives persons a common identity within the group and links current and previous generations.

21. The words ‘care and safekeeping’ within the Working Group’s fifth term of reference have been construed to cover all forms of treatment, including exhibition and loan.

Scope of the Report

22. In discussion with the ROC it was agreed that the Working Group should concentrate on archival collections, specifically human remains obtained prior to 1948, from both living and deceased persons. It was also agreed that material obtained at any date through biopsy or other surgical procedure, or from post-mortem examination carried out in the UK, should be excluded. All such material is the responsibility of the ROC.

23. The Working Group has, throughout its deliberations, considered the future of human remains as an independent matter, distinct from other material in the collections of museums (except for the special category of ‘associated objects’, dealt with in Chapter

8). This approach was accepted, if somewhat reluctantly, by some claimant groups which made submissions to the Working Group. One senior representative acknowledged that human remains were a ‘tight box’ issue.

24. After the Working Group had begun its deliberations, it was advised by the DCMS that it should consider only museums and galleries in England. The Working Group accepted this amendment of its terms of reference. The Working Group understands that the Welsh Assembly Government is being consulted on the applicability of the Report’s recommendations to Wales.

25. The Working Group has construed its remit as extending not only to museums funded by national government but also to local authority museums and university museums and collections: in fact, to all publicly funded institutions which hold collections of human remains.

26. Most human material in English museums is of UK origin, and its retention and treatment has hitherto been non-contentious. English Heritage and the Church of England have recently convened a working group to examine this area in detail. Although the Scoping Survey commissioned by the Working Group⁴ initially collected information on remains originating both within and beyond the United Kingdom, the evidence we have received and the recommendations we make deal primarily with non-UK human remains. The emphasis responds to the levels of concern about this subject expressed by indigenous peoples and others. Claims are in fact very uneven in their incidence: requests for return mostly originate from North America, Australasia and the Pacific, despite the fact that many remains in English collections are from other regions. For instance, we received no submissions on the return of human remains to Egypt, despite the large holdings of such remains in some museums. We believe nevertheless that many of the principles we have formulated⁵ and the recommendations we make⁶ apply with equal

4 Chapter 2.

5 Chapter 9 para 402 et seq.

6 Chapter 12.

force to the care of all human remains, whether claimed or not.

Acknowledgements

27. The Chairman wishes to extend his personal thanks to those who assisted him in the production of this Report. Thanks are due to James Bowman for editorial advice and assistance, Hugh Corner for drafting and compilation, Isabela Evans for assistance with research and production, Elaine Paintin for advice on documents, Tristan Shek for information on law and Katherine Sykes for assistance with overseas statutory and law reform material. Particular thanks are due to Charlotte Woodhead for legal research throughout the compilation of this Report and for the summaries of case-law and articles in Appendix 4.

28. The Working Group is also grateful to Kevin Chamberlain CMG for specialist advice on human rights law and related areas and for the analysis of these matters presented in Appendix 3; to Resource for funding the Scoping Survey referred to in Chapter 2 of this Report; to Jane Weeks and Val Bott for conducting and compiling the survey; and to the many individuals and groups who gave evidence, both to enlighten the survey and to inform the Working Group's deliberations at large.

29. The Working Group also acknowledges with thanks the support of officials of the DCMS in the conduct of its inquiry and production of this Report.

Chapter 2: Human remains in English museum collections

General

30. Preliminary research by members of the Working Group found that surprisingly little was known about the extent of collections of human remains in English museums and other collections (all known research published up to 2001 is included as Appendix 1 of the Scoping Survey available separately). The Working Group therefore commissioned a survey to map the broad scope of human remains held in museums and related collections in England. The Scoping Survey of Historic Human Remains in English Museums and Other Organisations (Scoping Survey) was conducted by two experienced consultants in the museum sector, Jane Weeks and Val Bott, who were guided by a steering group consisting of working group members Sally MacDonald, Tristram Besterman and Maurice Davies. The Scoping Survey was funded by Resource. The full report is available on the web at http://www.culture.gov.uk/cultural_property/wg_+human_+remains.htm.

31. In March 2002, a simple questionnaire was sent out to 164 organisations, selected by the steering group because they were thought likely to hold human remains. Of these 164, 159 proved to be eligible for inclusion in the Scoping Survey, and of these 148 responded (a response rate of 93%), two of them anonymously. The final analysis was carried out on the 146 identifiable completed questionnaires.

32. The response rate is very high, but it should be noted that the Scoping Survey represents an undercounting of human remains collections, for a number of reasons:

- 11 eligible museums did not respond at all.
- Two responses were noted as incomplete by the respondents.

- Two responses were anonymous and not included in the analysis of the data.
- There will be human remains in the possession of museums and organisations other than those selected by the steering group for inclusion.
- The Scoping Survey asked respondents to exclude certain categories of human remains, notably those which had been obtained through biopsies, surgery or post-mortems within the UK, as well as human remains obtained from living people after 1947. The Retained Organs Commission (ROC) is responsible for these categories of material.

On the other hand, the Scoping Survey included many collections outside registered museums, particularly collections held by universities in a non-museum setting.

33. A fundamental problem with the Scoping Survey was the difficulty of defining a single human remain. In some cases it may be a whole skeleton, in others a single bone or tissue sample. This problem was recognised at the outset, as the resources were not available to undertake a survey that used a consistent counting methodology across all collections. The final point to be aware of when considering the results is that the survey did not include collections in Scotland, Wales or Northern Ireland.

The volume of human remains in collections in England

Overall volume

34. A total of 132 of the 146 responding collections hold human remains. Between them these collections house at least 61,000 human remains. Around half (64) have fewer than 50 items; a quarter (34) have fewer than 10; larger collections of over 500 items were held by 25 institutions.

Overseas historic human remains 1500-1947

35. This part of the Scoping Survey was aimed at remains of indigenous peoples from nine geographical areas: Africa, Europe, Asia, the Americas, the Pacific, New Zealand, Australia and Tasmania, the Middle East and Greenland. The date range encompasses the post-mediaeval colonial period up to the point where remains become the concern of the ROC. Sixty responding organisations hold human remains from overseas from the period 1500-1947. About a third (21) hold remains from only one of the nine geographical areas. Only five institutions hold material from eight of the regions and of these only two collections have human remains from all nine geographical regions. Only eight museums have more than 100 remains from any one geographical area. The techniques used for the Scoping Survey mean that it is not possible to be precise about the overall size of holdings (and in any case, there is no consistency in the way remains are counted; see above), but it is possible to calculate a reliable figure for the minimum possible holdings as follows:

Geographical area	Number of institutions	Minimum overall holdings
Australia/Tasmania	18	382
New Zealand	21	187
Americas	25	1,074

Note: This table is a strict calculation of the minimum numbers held. Actual holdings are likely to be significantly greater than shown in the table.

Overseas historic human remains pre-1500

36. The questionnaire did not require institutions to specify the geographical origins of remains within this category. Sixty-one hold human remains from overseas which are pre-1500. Of these 54 hold fewer than 50 items, while six hold more than 250 items within their collections.

UK human remains from archaeological contexts

37. Of the 132 institutions holding human remains, 106 hold human remains from the UK acquired as a result of archaeological activity. Of these institutions, 47 have fewer than 50 items, while 19 have more than 500 items.

UK human remains acquired for medical purposes

38. The Scoping Survey excluded material which had been obtained through biopsies, surgery or postmortems within the UK, as well as human remains obtained from living people after 1947. The ROC is responsible for these categories of material. In total, 27 institutions hold other human material acquired for medical purposes: 20 hold fewer than 50 items and four collections comprise over 500 items.

The use of human remains by collections in England

Storage

39. Institutions store most of their human remains unused. Over 60% of these appear to be remains which have been excavated in the UK. Only nine of the 132 institutions holding historic human remains reported that the storage of human remains is in accordance with conditions agreed with the originating community.

Display

40. More than two-thirds of the institutions have some, most or all of their collection of human remains on public long-term display (more than one year). Only seven institutions (5%) have all of their collection of human remains on public long-term display and these collections are small.

41. The Scoping Survey considered temporary as well as long-term display. The Royal College of Surgeons recorded a third category, that of non-public medical display. Here access is restricted to students and researchers, and collections are effectively displayed in open store.

Requests for return of human remains from collections in England

Number of requests

42. Thirteen (22%) of the 60 institutions holding human remains from overseas (1500-1947) have received requests for the return of human remains. A total of 33 requests was reported by these institutions.

43. While the total number of requests for return perhaps appears low at first sight (and some of the claims repeat earlier claims), it is essential to recognise that in many cases the beliefs and emotions leading to individual claims are strong. As shown by the evidence received by the Working Group (Chapter 4), members of some indigenous communities continue to grieve until the spirits and bodies of their ancestors are at rest. The psychological, and arguably the physical and social, health of these communities is damaged.

44. As a comparison, the number of claims for return of human remains is significantly higher than the number of claims received by, or expected to be received by, the Spoliation Advisory Panel (which by May 2003 had received five claims). Furthermore, the number of claims for human remains may increase in future, for example as a result of the information contained in the Scoping Survey itself, much of which has not been published before.

Sources of requests

45. The 33 requests reported were made up as follows:

- 11 from Tasmanian Aboriginals (one of these appears to be a joint request with Australian Aboriginals);
- ten from New Zealand Maori;
- six from Australian Aboriginal communities (one of these appears to be a joint request with Tasmanian Aboriginals);
- five from various communities in the USA (Hawaii, Chicasaw, Comanche and Mohegan);
- one from Torres Strait Islanders; and
- one unspecified Aboriginal.

46. In addition, two requests were reported for the reburial of medieval Jewish remains of English origin.

Recipients of requests

47. Of the 33 requests, 20 were made to just three institutions: the British Museum, the Natural History Museum and the Royal College of Surgeons.

Outcome of the requests

48. Of the 33 requests for return reported in the survey:

- seven resulted in agreement to return;
- five decisions are pending;

- 13 were refused on the grounds that they were prohibited by legislation; and
- eight were refused for other reasons, two specifically citing scientific significance.

Returns of human remains

49. Respondents reported four returns of human remains and a further three agreements to return remains that, at the time of the survey, had not yet seen the remains returned, as follows:

Institution	Community/region	Date
Manchester Museum	Maori	1990
Pitt Rivers Museum	Australian Aboriginal and Tasmanian Aboriginal	1990
Whitby Museum	Maori	1997–98
Royal College of Surgeons	Tasmanian Aboriginal	May 2002
Manchester Museum	Australian Aboriginal	July 2003
Royal College of Surgeons	Torres Strait	April 2003
Horniman Museum	Australian Aboriginal	August 2003

50. The Scoping Survey also reported decisions pending at:

- Bristol City Museum and Art Gallery;
- National Museums and Galleries on Merseyside;
- Saffron Walden Museum (two requests); and
- University of Oxford Museum of Natural History.

51. In addition, Derby Museum commented: ‘We would be happy to return the Maori material and material from Elizabeth Island (Magellan Straits) if requests came from the originating communities.’

52. It is useful to add that Simpson, 1994 reports several institutions that returned remains in the 1990s and were not picked up by the Scoping Survey, as follows:

Institution	Items returned	Date
Bradford University	Australian Aboriginal	1990
Oxford University	Australian Aboriginal	1990
Museums of Exeter	1 Canadian skull Portions of 2 Maori skeletons	1996
Peterborough Museum	1 Australian Aboriginal skull	1990

[Note: Simpson, 1994 also reported five skulls and one jawbone (Australian Aboriginal) as having being returned by the Horniman Museum in 1993–94. These are in fact the same remains reported to the current survey as ‘not yet returned’. The Horniman received the request in 1990 and removed the remains from display. In 1993 the museum agreed to accede to the request. However, subsequently it emerged that the lack of documentation on provenance complicated the issue from the Australian perspective and the matter has been on hold until appropriate policies and procedures can be brought to bear on the case.]

53. In sum, a total of 10 institutions in England are known to have returned, or agreed to return, human remains. A further four are considering returning human remains in response to specific requests and at least one other has indicated a willingness to return should a request be received.

54. Note that one English national museum (National Museums and Galleries on Merseyside) is considering return. Simpson, 1994 reports that the Ulster Museum (a national museum in Northern Ireland) returned a Maori preserved head in 1991.

55. The Scoping Survey showed that there is often a lapse of time between the initial request for return of the human remains and the making of the eventual decision. The institutions gave a variety of reasons for such delays.

Refusals to return

56. The 2002 survey reports 13 refusals to return from national museums in England: seven from the British Museum (however, the museum reported several repeat requests and these appear to cover only two categories of human remains), and six from the Natural History Museum. In all 13 reported cases, the museums refused the requests on the grounds that return is prevented by legislation.

57. Three other institutions report refusals to return: the Duckworth Laboratory, Cambridge (on the grounds that return was against policy then in operation); Reading Museum (on the grounds that the item was ‘no longer in collection’); and the Royal College of Surgeons. In the case of the Royal College of Surgeons the refusals date from 1991 to 1997; policy has since been reversed, and all Australian Aboriginal human remains have been returned.

Power to return

58. Among the national institutions that have consistently refused to return human remains, there is a general conviction that such return is prevented by legislation. Without discounting the possibility of other methods of sanctioning return,⁷ we believe that express relaxation of the British Museum Act 1963 would enable the relevant museums to return remains at their discretion without any concern that such return is contrary to law. The Natural History Museum favours a relaxation of its governing statute to this effect.

⁷ See generally Chapter 5.

Chapter 3: Origins and destinations

General

59. This chapter outlines the circumstances in which collections of human remains were acquired, the reasons motivating their acquisition, and the very different consequences for science and for the communities from which the remains originated. Past events, combined with different cultural perspectives, have produced in the United Kingdom wide differences of opinion between some members of the scientific, medical, and museum communities and some members of communities of origin about the legitimacy and appropriate use of collections of human remains. A significant section of the scientific community believes that it is in the public interest to retain such collections for scientific study, while some indigenous communities assert both a right and a responsibility to repatriate and bury their dead (while also contending that the respectful treatment of the dead by all communities is itself in the public interest). Increasingly, however, museum practitioners believe that the views of originating communities should be accorded a status and respect comparable to that given to the scientific and medical communities. An exploration of the circumstances under which some human remains in English museums were originally acquired raises important contemporary ethical issues, particularly with regard to the primacy of consent.⁸ On the other hand, much of the material in English collections is believed to have been legitimately acquired, and has never given rise to ethical issues.

60. In common with the general focus of the Report, this chapter concentrates on human remains of overseas (non-UK) origin.

Histories of acquisition

61. The human remains from overseas that are currently held in English collections include items derived from many different sources: excavations of archaeological sites,

⁸ See further Chapter 7.

travellers who acquired items as curios, organised expeditions intended to provide collections for medical and scientific research, and transfer from other museums or collections. The Scoping Survey of Historic Human Remains in English Museums and Other Organisations (Scoping Survey) commissioned by the Working Group found that 60 of the museums surveyed held human remains from overseas, mainly from Africa, Europe, Asia, the Americas, and the Pacific. The pattern of acquisition of these remains was part of the development of scientific enquiry and was associated with the growth of the British Empire.

62. The period following 1500 was crucial in the development of scientific knowledge in Europe, especially medical knowledge, the comparative study of different human populations and the study of human origins. Human remains were collected locally to create research and teaching collections in these and related fields. As medicine developed, these collections were kept by professors, surgeons and dentists, and were often held within universities, including early museums such as the Ashmolean Museum at Oxford.

63. Before the 19th century, collecting tended to be sporadic, with rare or unusual specimens brought back to Britain by explorers, colonial officials, traders and others. Such collections were acquired as part of a broader attempt to understand the new peoples being encountered, and the relationship between their origins and those of British people. Some material also represented physical anomalies, such as congenital malformations or the results of disease, or cultural practices such as head-shaping or foot-binding, and was acquired partly to extend the range of knowledge and partly as a curiosity. Human remains entered private collections, research and teaching collections at universities, and museums for these purposes.

64. During the 19th century, questions of origins and ideas about 'race' became very important in scientific circles, and collections of human remains were used to demonstrate theories about human evolution and the relationship between human populations on an evolutionary scale. Throughout the 19th century, much larger numbers

of human remains were acquired by scientists, either on collecting expeditions or while conducting other official duties overseas, and especially in British colonies. Material was also exchanged between museums in this period (and up to the mid-20th century). Nineteenth-century collecting of remains in British colonies was also increasingly motivated by a desire to preserve mementos of what were believed to be vanishing races. Material which incorporates human remains, such as finger-bone necklaces, Tibetan thigh-bone trumpets, or shrunken heads, was similarly acquired as interesting cultural specimens, before such practices disappeared in the face of colonisation and modernity. Along with such human remains associated objects, such as funerary pots or wrappings, or items buried with the dead, were also acquired.

Circumstances of acquisition

65. Human remains were acquired in a very wide range of circumstances. As noted earlier, some material came to England from museums abroad. Other remains, such as Maori *mokomokai* (tattooed heads) or Shuar/Achuar *tsantsas* (shrunken heads) were both taken from, and traded by, indigenous peoples. Other material was acquired in the field by collectors in circumstances which were unethical even by the standards of the time, including duress, deceit, unlawful removal and, very occasionally, murder. Bodies were taken from graves or tree burials, picked up after military battles, or obtained from hospitals. Colonised peoples, such as Australian Aborigines, First Nations/Native American peoples, or Tasmanians, were often unable to prevent the removal of human remains because of the dynamics of power in colonial situations.⁹

66. The following are given as representative examples of the more discreditable circumstances of acquisition. They show that the collection of discreditably-removed remains was not confined to English museums, and they are matched by many similar

⁹ Cressida Fforde, Jane Hubert and Paul Turnbull, *The Dead and their Possessions: Repatriation in Principle, Policy and Practice* (2002) London: Routledge, p 26 and Moira Simpson, *Making Representations: Museums in the Post-Colonial Era* (2001) London: Routledge, pp 176-177 provide overviews of collection practices that would be regarded as repellent today and may well have been similarly regarded at the time.

examples. In the 1860s, John Lord, a boundary survey naturalist, stole from a chief in the Fort Rupert area of British Columbia a culturally-shaped head of an Indian, who had been shot and decapitated in a raid, and gave it to the British Museum for comparison with other culturally-altered skulls.¹⁰ The remains of Inakayal, a Mapuche chief in Argentina, were transferred from his deathbed to the collections of the La Plata Museum in 1888.¹¹ Ales Hrdlicka, excavating without community permission at Larsen Bay in Alaska, noted in 1929 that he had been accosted by a woman protesting that the bones he had just removed were those of her husband, and on another occasion at the same site collected bones and then left by a difficult route ‘to avoid notice’.¹² At the Flinders Island Aboriginal Settlement in Tasmania, where the mortality rate for Tasmanians was exceptionally high, George Augustus Robinson, the head of the settlement and later ‘Protector of the Aborigines’ in the district, used the bodies of dead Aboriginal people to supply scientific curiosities to representatives of the Crown. Robinson reports that on his first meeting with Governor and Lady Franklin at Wybalenna in January 1838 they ‘...solicited me for curiosities, also a skull of an aboriginal’. The Governor’s secretary Captain Maconochie also asked him for a skull.¹³ On 27 February 1838 at the same place, the surgeon removed the head of the deceased ‘Christopher’ (Mitaluraparitja) to have it ‘masticated’ and sent to Maconochie.¹⁴ Robinson later ‘retained’ the cranium of Pintawtawaw, who died in August 1838, and sent it to Lady Franklin in February 1839. Skull No. 94.1.20.1 in the Natural History Museum’s Tasmanian collection is labelled ‘Lady Franklin’.

67. While many regarded these kinds of acquisition of human remains as unethical (if not worse), others thought them necessary for the development of scientific collections.

10 Cited in D. Cole, *Captured Heritage: The Scramble for Northwest Coast Artifacts* 1995. Vancouver: UBC Press, p 307.

11 Endere in Fforde et al., op. cit. p 272.

12 G.L. Pullar, ‘The Qikertarmiut and the scientist: fifty years of clashing world views’, in Tamara L. Bray and Thomas W. Killion, eds.,

Reckoning with the Dead: The Larsen Bay Repatriation and the Smithsonian Institution (1994) Washington, DC: Smithsonian Institution Press, pp 22–23.

13 Robinson’s journal 1835–38, entry for 26 January 1838, in N.J.B. Plomley, *Weep in Silence: A History of the Flinders Island Aboriginal*

Settlement (1987) Hobart: Blubber Head Press, p 530.

14 In Plomley, op. cit. p 537.

Collecting was further justified by theories which claimed that many non-European peoples were less evolved than Europeans or less than fully human, as well as by beliefs that indigenous peoples were ‘vanishing’ and needed to be collected for study before they did so. As the celebrated anthropologist Franz Boas wrote in 1888, stealing bones from graves was ‘repulsive work’ but ‘someone had to do it’.¹⁵ But such attitudes and collecting practices would have met with both criminal punishment and moral outrage had they been applied to the bodies and graves of white citizens.

68. Other remains were obtained under official policies that were accepted by the dominant society, but not necessarily by the indigenous communities. In the United States, for example, the Army followed an 1862 directive from the Surgeon-General to acquire Native remains for study by collecting bones and crania from graves and following military suppressions of Native acts of resistance, such as the Antelope Creek massacre.¹⁶ The purpose of this collection was ‘to aid in the progress of anthropological science by obtaining measurements of a large number of skulls of aboriginal races of North America’.¹⁷

69. Finally, some collecting occurred in situations where no objection was made by local groups, usually because their cultural beliefs did not attach value to physical remains. Much collecting was also done from archaeological excavations in locations where there were no local indigenous peoples at the time, and some material was acquired directly from indigenous people representing the remains of their enemies. English museums also acquired items from earlier collections that may or may not have been lawfully and ethically obtained. The Duckworth Centre at Cambridge, for example, incorporates: a range of 19th century collections formerly owned by professors; material formerly in the Department of Anatomy; and material from the Cambridge University

15 Cited in Cole, op. cit.

16 R. Thornton, ‘Repatriation as healing the wounds of the trauma of history: cases of Native Americans in the United States of America’, in Fforde et al., op. cit. pp 17–18.

17 Larry Zimmerman, ‘Anthropology and Responses to the Reburial Issue’, pp 92-112 in Larry Zimmerman and Thomas Biolsi, eds., *Indians and Anthropologists: Vine Deloria Jr. and the Critique of Anthropology* (1997) Tucson: University of Arizona Press, p 94 and Simpson, op. cit. p 175.

Museum of Archaeology and Anthropology. Similarly, collections in the Natural History Museum in London include material from hundreds of archaeological excavations, including a good deal of human bone from sites in Syria, Israel, Egypt and Nubia.

Consequences

Consequences for science

70. Medical science, anthropology and related disciplines have derived powerful benefits from collections of human remains. Research has often been led by developments in the United Kingdom, in part because the collections of human remains in the United Kingdom are so diverse, lending themselves to study of the similarities and differences within a population across time and among populations. But significant formative developments have occurred elsewhere, for example in the United States.

71. In medical science, collections of human remains have facilitated the development of knowledge of anatomy and biology, and of various diseases and injuries and their treatment. In the US, such collections were made during and after the Civil War to develop knowledge of wounds and their healing.¹⁸ During questioning by the Working Group, some scientists stated that few medical discoveries had arisen exclusively from study of overseas remains. Rather, research on such collections has tended to concentrate on population origins and comparisons.

72. Within anthropology and social science, collections of human remains had, by the late 19th century, become central to the development of scientific theories about the origins of human populations, the relationships among them, evolution, culture, and race. In particular, crania were seen as important indicators of 'race', and were collected from populations around the world to facilitate comparison of the physical and intellectual

¹⁸ 'Actual and potential benefits', submission by staff of the National Museum of the American Indian to the Working Group.

capacity of different peoples,¹⁹ and thus enhance understanding of the origins, histories and relationships of human populations. All kinds of human remains, however, from hair and fingernails to skeletal material, have been analysed for similar comparative studies.

73. Analysis of human remains has contributed significantly to areas of knowledge such as osteology, forensic identification (e.g. the CRANID database, which uses data derived from museum collections around the world and can be used to assign unknown crania to a population or region), and the nature and physical and social effects of epidemic disease. Studies of osteoporosis, breast cancer, and other illnesses such as occupational hazards have also benefited from comparison of data from multiple populations across the world at different stages of history. The effect of pollution and environmental disasters such as mercury poisoning from paper mills or radiation poisoning is also traceable from hair and other human tissue, before and after death. Human remains have also been used to improve understanding of cultural practices such as body modification (e.g. foot-binding), warfare, infanticide, occupation, and mortuary treatment. Forensic anthropology, which contributes to the identification of victims of crime or disaster, has made enormous gains from the comparative study of human remains in a variety of post-mortem contexts.

74. Demographic studies have explored the lifestyles, diet and seasonal food shortages within populations, and the effects of these and disease on the age and gender balance of societies. They have also examined population movements and intermarriage between peoples.

75. The broadest studies have shed light on large-scale patterns of human evolution, adaptation, diversity, migration, and historical contact. Most recently, DNA studies on historical and ancient remains have begun to reveal further information about such topics, particularly population movements and histories. These kinds of studies use fossil

19 See e.g. Fforde et al, op. cit. pp 25–26; G. Stocking, *Bones, Bodies, Behavior: Essays on Biological Anthropology* (1988) Madison: University of Wisconsin Press; G. Stocking, *Victorian Anthropology* (1987) Madison: University of Wisconsin Press; A. Markus, *Governing Savages* (1990) Sydney: Allen and Unwin; D. Monaghan, 'The body snatchers', in *The Bulletin*, 12 November 1991, pp 30-38; and H.K Fry and R.H. Pulletin, 'The mentality of the Australian Aborigine', in *Australian Journal of Experimental Biology and Medical Science* 8(1931) pp 153-67.

remains as well as more recent remains.

76. The study of human remains has thus contributed to the advance of scientific knowledge on a broad range of topics. The scientific community feels that it is of great importance that collections of human remains be maintained for study: 'It is considered vital that collections of human remains are retained within our museums representing the broadest possible spatial and temporal range ... Human remains currently held within UK museums, universities and other specialist institutions such as the medical colleges represent a unique and irreplaceable resource for the legitimate pursuance of scientific and other research.'²⁰

Consequences for overseas communities of origin

77. The collection, retention and research of human remains has occurred at the cost of great distress to some communities, particularly to overseas indigenous peoples. This anguish stems in part from the conditions under which such material was acquired and in part from variant cultural views on the proper treatment of the dead. Some indigenous peoples regard science and the institutions pursuing scientific study as having been enriched at their expense. There are many records of attempts by communities of origin to prevent removal of remains, and of protests when such material was taken. That people were unable to prevent the removal of human remains (including, in some cases, the bodies of loved ones recently deceased) was, and remains, a source of great pain and anger. These consequences, combined with often very different cultural views on the appropriate disposition of the human body at death, have created conflict between the scientific community and indigenous communities.

78. The effects of the removal of human remains from overseas communities varied by region and community, according to the cultures and political situations involved. Those peoples most affected have been Tasmanian Aborigines, Australian Aborigines, New Zealand Maori, and Native Americans and First Nations peoples. In these

²⁰ British Association of Biological Anthropology and Osteoarchaeology submission to the Working Group, 27 November 2001, pp 2, 5-6.

communities, the removal of human remains occurred simultaneously with the imposition of colonial rule, scientific and political assertion of the superiority of settler society, and the use of such theories to justify attempts to assimilate or eradicate indigenous peoples. It also occurred simultaneously with other losses such as those affecting land, self-determination and customary rights. The inability to prevent the removal of human remains has therefore become part of the larger process by which these communities became disempowered and largely dispossessed, and the disrespect shown by those who stole bodies has been part of a more general racism faced by members of these communities.²¹ The fact that source communities are, still, approached only rarely to be informed or asked about the existence of human remains in museum collections, the nature of research done upon these, the findings of such research, or the storage, labelling, and display of human remains, serves to perpetuate the often strained relations between museums and overseas communities of origin, and the pain caused by the legacy of the former's acquisition of human remains.

79. Human remains are therefore both a reminder and a cause of great pain to such indigenous peoples, who see the continued holding of remains in museum collections as reflecting continuing injustice. In their view, restitution and reburial constitute part of the healing process which indigenous communities must undergo in order to survive. 'To many Native Americans, the collecting of their ancestors' bones and bodies by museums is a source of pain and humiliation and the last stage of a conquest that had already robbed them of their lands and destroyed their way of life.'²²

80. The cultural beliefs of some communities entail severe consequences for both the living and the dead if bodies are inappropriately handled or are not disposed of according to cultural protocols. Within such beliefs, the disturbance and removal of human remains causes damage, both to the dead, whose spiritual journeys and rest are interrupted, and to

21 Stocking, op. cit.; Fforde et al., op. cit. p 29.

22 Douglas Preston, 'Skeletons in Our Museums' Closets', *Harper's Magazine*, February 1989, in A. Gulliford, *Sacred Objects and Sacred Places: Preserving Tribal Traditions* (2000) Boulder: University Press of Colorado, p 23.

the living, whom they haunt.²³ Depending on the circumstances of collection, individuals whose remains exist in museum collections may also have been denied appropriate last rites, and living community members and descendants have felt and continue to feel a responsibility to care for the dead.

81. Not surprisingly, the Working Group's Scoping Survey showed that the majority of repatriation requests come from communities where the removal of human remains occurred in historic situations of colonisation and imbalances of power. Over two-thirds of the repatriation requests came from Tasmanian Aborigines, Australian Aborigines and New Zealand Maoris, with others largely from Native Americans. For these peoples, regaining control of human remains has become part of a larger set of efforts towards asserting cultural vitality and self-determination. In this context the US repatriation statute, the Native American Graves Protection and Repatriation Act (NAGPRA), has been called 'a significant piece of human rights legislation that permits the living to reassert control over their own dead'.²⁴ In England, the Human Rights Act 1998, enacting into English law the European Convention on Human Rights, may prove no less significant.²⁵

Conclusion

*'One might imagine a scene of a scientist gently and carefully removing an Alaska Native skull from one of the storage drawers and carrying it with a sense of reverence to an examination table, where it would be carefully studied. To most indigenous people, the mere storage of ancestors' remains in drawers located thousands of miles from their burial place was the height of disrespect.'*²⁶

23 J. Riding-In, 'Repatriation: A Pawnee's Perspective', in A. Devon Mihesuah, *Repatriation Reader: Who Owns American Indian Remains?*

(2000) Lincoln: University of Nebraska Press, p 109.

24 Gulliford, op. cit. p 14.

25 See Chapter 6 and Appendix 3.

26 Pullar, op. cit. p 19.

82. We believe that, aside from its value as history and an aid to understanding, the evidence examined in this chapter justifies seven conclusions:

- First, much of the overseas human material in English museums was removed from its original location after the death of the subject without the informed and prior consent of that person, or his or her kin or community. In many cases overt protest was made at the time, while in others people may have been insufficiently aware of events to mount an effective contemporary protest.
- Secondly, in a significant number of cases, this lack of consent persisted throughout the later acquisition of the material by the museum, and extends to its current holding and other treatment, such as research.
- Thirdly, these circumstances are a continuing source of great pain to members of overseas indigenous communities, in that they prevent those communities from fulfilling a sacred responsibility to care for the remains, honour their ancestors and lay ancestral remains to rest.
- Fourthly, English museums were not alone in acquiring and using the remains of indigenous people without their consent; similar practices occurred, for example, in relation to the treatment of indigenous remains by US museums and medical authorities.
- Fifthly, some acquisitions of human remains by museums conformed to principles, standards and values current at the time of acquisition, while other such acquisitions may have occurred in circumstances affording no clear ethical or professional guidance.

- Sixthly, many enlightening scientific advances have been made through the medium of such material. Evidence recorded later in this Report²⁷ shows that those who perform contemporary research on human material do so in the honest perception that the work is of public benefit.
- Seventhly, the different stances of researchers and indigenous peoples have traditionally been characterised by a relative lack of constructive communication between them. The scientific community in the United Kingdom still operates largely in isolation from communities of origin. It will become apparent later that this situation stands in contrast to that in other countries, where indigenous populations exist as articulate and politically active elements of society, and where the scientific community has already taken significant steps to become accountable to those communities.²⁸

83. Some of these conclusions are confirmed by material presented in later chapters. We return to all these matters in due course.

²⁷ See Chapter 4, para 96 et seq.

²⁸ Just as the medical community has acknowledged an increasing accountability in its retention and treatment of human tissue and organs: see Chapters 5 and 7, para 194 et seq, 330 et seq.

Chapter 4: Evidence submitted to the Working Group

Evidence considered and its importance

84. The Working Group considered a wide range of evidence:

- in response to an open invitation for submissions of evidence, we received 47 written submissions;
- we received nine presentations in person, each of which was followed by questioning by the Working Group;
- we established five ad hoc research groups, each of which sought evidence widely²⁹;
- we commissioned research on two subjects: the scope of human remains in collections in England³⁰ and the implications of the Human Rights Act 1998;³¹ and
- the evidence we considered was not limited to that listed above: we read widely and consulted with many colleagues in the UK and overseas.³²

85. The Working Group is extremely grateful to all those who supplied and prepared evidence. We are particularly grateful to those who gave evidence in person; some travelled thousands of miles at their own expense in order to do so. Those who presented evidence in person generally shared two admirable characteristics: a deep belief that their

²⁹ See Chapter 1.

³⁰ See Chapter 2.

³¹ See Chapter 6 and Appendix 3.

³² In particular the Chairman had extensive discussion with interested persons and groups during two visits to Australia. See generally Chapters 1 and 5.

proposals were firmly in the public interest, and an ability to recognise – and usually empathise with – other points of view about the treatment of human remains. The willingness to consider other points of view usually emerged only during questioning by Working Group members; it is not usually evident in written submissions. The opportunity to question people who appeared in person was therefore a particularly important part of the Working Group's activities.

86. Considering evidence was at the heart of the Working Group's work and we studied all of the evidence received, jointly or individually. The Working Group began the process with some knowledge of the varied views held about human remains and we have all learned much – and as a result all developed our own opinions – as a result of considering evidence. For all members of the Working Group it was a stimulating, if sometimes difficult, learning process. We each started this exercise with different views, and it is undoubtedly the case that differences remain. However, the evidence has led us to common conclusions, set out in the final chapters of this Report.

87. This chapter aims to set out the essential perspectives contained within the evidence received. In general, the aim in this chapter is not to pass judgement on pieces of evidence, but simply to report them; we defer our conclusions and recommendations until later in the Report. The inclusion of a piece of evidence in this chapter (or indeed elsewhere) does not in any way represent an endorsement by the Working Group. Some material has been selected because it characterises a widely expressed view, other testimony is cited because it makes an especially subtle or highly significant point. It is not practicable to cite all the evidence received and the selection of evidence for inclusion is, by definition, selective. The full written evidence received is available on the Internet.³³

33 See http://www.culture.gov.uk/cultural_property/wg+human_remains.htm.

Views of parties who made oral representations to the Working Group

88. The debate about the future treatment of human remains in UK collections has often been expressed as an irreconcilable conflict between ‘scientists’ and ‘indigenous people’, as seems to be demonstrated in the following submissions made to the Working Group.

89. ‘All human remains currently curated within UK institutions and museums should be retained for future study by *bona fide* researchers.’³⁴

90. ‘We recommend that the British Government adopt a policy for unconditional repatriation of all Aboriginal human remains to Aboriginal people.’³⁵

91. With such polarised views, how can any progress be possible without one ‘side’ winning and the other losing? Is consensus impossible? Consensus will sometimes be difficult to reach – and in other cases may be impossible (this scenario is discussed in more detail below) – but the evidence considered by the Working Group suggests that it is often achievable.

92. ‘There is not an opposition between UK-based scientists and indigenous groups in other countries.’³⁶

93. The Working Group was told of research on an individual called by the Champagne Aishik people Kwaday Dan Ts’inchi (Long Ago Person Found) who died about 550 years ago and was found in 1999 in a glacier in British Columbia. Research and reburial were carried out collaboratively by the Aishihik and Champagne First

34 Presentation to the Working Group, 19 November 2001.

35 Submission to the Working Group, December 2001.

36 Presentation to the Working Group, 12 June 2002.

Nations (indigenous) groups, the British Columbia provincial government and scientists in several countries. The First Nations people were keen to find out more about the person, but they had a strong policy that human remains should be cremated.

Nevertheless they allowed a year of scientific analysis on the remains. A range of tests was undertaken, including radiocarbon dating, DNA analysis and dietary reconstruction using hair, skin and bone, before the remains were returned to the tribe and cremated.

Some samples were retained for further study.

94. The Mokomokai Education Trust of New Zealand (whose aims include negotiating the return to New Zealand of Maori skeletal remains and preserved tattooed ancestral heads) told the Working Group that a new generation of Maori would want to study human remains rather than bury them, although views about the treatment of remains after repatriation varied among individual tribes. (It was made clear that the Trust did not necessarily represent the views of all Maori.) The Mokomokai Education Trust would be open to consider any terms or conditions that institutions returning human remains might wish to negotiate.

95. The Working Group received a significant amount of evidence, similar to the two examples cited above, suggesting that there are many positions in between the extremes represented by the statements in paragraphs 89 and 90. Compromise or middle-ground positions have not been explored often enough. That is the most important business of this chapter.

The views of scientists

96. The extensive work undertaken by scientists on collections of human remains is summarised in Chapter 3. This chapter concentrates rather on the evidence by scientists as to the future treatment of human remains rather than as to research already conducted.

97. The views expressed by individual scientists and scientific organisations vary considerably. At one end of the scale is what might be called the ‘resolutely retentionist view’. One presentation to the Working Group³⁷ focused on the use of human remains in UK collections including the fact that the UK is ‘a world-leading centre of research ... it is estimated that more than 1,000 requests are made to UK museums for access to skeletal remains annually’. This was from a group representing the professional interests of biological anthropology and osteoarchaeology.

98. Its views included the following:

- ‘All human remains currently curated within UK institutions and museums should be retained for future study by *bona fide* researchers.’
- ‘Failure to retain them for the future would mean that we would be unable to continue research and maintain our position in the field.’
- ‘Collections should continue to be made available to researchers so that studies can be repeated and findings replicated by others. The threat of the potential removal of important materials from the research community violates this ethical principle [i.e. the need to be able to replicate earlier research] and may damage the integrity of scientific research in our discipline.’
- ‘Because a collection was obtained *via* means that we find unacceptable, does not automatically mean that we should consider consigning it to repatriation. While it is appropriate that we have current acquisition policies that are underpinned by ethical and moral constraints, to apply these retrospectively will not redress the sins of ‘our fathers’.’

- ‘Such a reaction would deny future opportunities for scientific research, which is itself unethical, and wasteful of a precious and irreplaceable source of scientific information.’
- ‘The extermination of the Aboriginal Tasmanians (genocide) is an appalling crime and amongst the worst atrocities of colonialism. Ironically, in this case, the facts render demands for the repatriation of remains of Tasmanian origin empty. Strictly speaking the Tasmanians were a geographical isolate and have no descendants to claim their relatives.’³⁸
- ‘In the context of scientific advance, it is impossible to know which collections are likely to assume importance in the future. We cannot predict the techniques for analysis that will be devised within the next five years, or the questions that will be addressed by their application.’

99. These views do indeed appear to be uncompromising.

100. However, members of the profession made it clear that there was room for debate. In discussion with the Working Group they expressed the following views:

- Special treatment of human remains by communities of origin caused no objection in principle, although there could be problems if bones were smoked, for example, as this permanently altered their radio-carbon dating; processes such as oiling and anointing also have physical effects.

³⁸ Note that this is disputed. According to the Tasmanian Aboriginal Centre Inc, Tasmania currently has a population of about 5,000 Aborigines (out of a total population of under 500,000). Today’s Tasmanian Aborigines descend from about a dozen Aboriginal women who escaped from prison camps established after the colonial government decided in 1829 to round up all remaining Tasmanian Aborigines (many had already been killed by the British, who first landed in Tasmania in 1803).

- The professions support the *Vermillion Accord*³⁹ as regards material that is currently being excavated.
- They approve of cases where indigenous peoples scrutinise research projects. Indigenous peoples have a legitimate interest.

101. There are remains on which it is not appropriate to undertake research; consider, for example, the remains of victim of crime (including a war crime) that are being studied forensically for reasons of law enforcement. Written evidence from the two professions, which was finalised after discussion with the Working Group, states: ‘It is inconceivable that [we] will ever condone using forensic material for research other than in exceptional cases. Such research could only take place ... where both the victim and their relatives have consented to such work.’

102. It was noted that the Working Group might not agree that all human remains should be retained. In the case that the Working Group ‘decide[s] to recommend the repatriation of some specimens or collections currently held within our museums ... this should only be permitted if the claimant group can demonstrate a legitimate claim to the material that is beyond reasonable doubt and based upon biological ancestry. In such cases the descendant group must also be able to guarantee curatorial policies and resources that will ensure the following: that the material remains readily accessible and available to legitimate researchers from around the world; that the remains are curated in a manner that will not compromise their research potential (i.e. cultural practices that will prevent further analysis e.g. anointing the remains with oils and smoking).’

39 See Chapter 5 para 176.

103. The Working Group heard evidence from researchers in human evolutionary studies. They gave an impressive account of some of the research work undertaken on collections of human remains and of the benefits that flow from such research. They note that scientists have benefited greatly from collections in western institutions:

We cannot avoid the fact that ... the circumstances of collection would often be completely unacceptable today. However, it is worth noting the following: the formation of major national collections that represented the whole of human diversity meant that scientists and anthropologists were able to look at issues comparatively; ... this material has been conserved and is available for whatever uses are deemed appropriate. Had our predecessors not been so inquisitive and so organised, then this material under the circumstances prevailing in many countries, would have been lost forever.

104. As far as the future treatment of human remains is concerned, their views point to compromise:

- As far as recently collected material is concerned, the need is to ‘ensure that there is a balance between the demands of reburial (where there is a loss to science), local needs (where there may be an important addition to local cultural heritage, but reduced research access and quality of conservation and facilities), and international-level collections’.
- Repatriation and reburial are different issues. As far as repatriating human remains to their places of origin is concerned: ‘It may well be the case that under the current conditions of the world, it would be appropriate for the skeletal material to no longer be held in the major collections of Europe and the USA, but that they are more properly kept locally. Were this policy to be followed [access would be more difficult for researchers but] in theory at least there would be no loss of information on the global past of human diversity ...

Countries such as Kenya and Tanzania take great pride in the way in which fossils found in their countries reveal human evolution and have built world-class museums and facilities to house them. The case for maintaining European hegemony in this matter no longer holds. Although destruction of material remains a greater concern, the establishment of important collections in other parts of the world should be seen as an important goal for the international community.’

- ‘[Requests are often made that] once repatriated the material should be destroyed or reburied or put beyond the reach of scientific or other communities than the one that has claimed them ... Where this occurs, in effect the rights of the local claiming community are seen as absolute, and there is, as a consequence, a loss of irreplaceable material of great anthropological significance. As anthropologists with a deep concern not just for science, but also the heritage of humanity as a whole – our evolutionary history is a rich part of being human – it is that loss which is the greatest danger.’
- ‘In numerical terms [human remains] from Australia and the USA [in UK collections] would be less than 1% of the total. In this light, full and unquestioning repatriation of all material claimed would have very little quantitative impact on the collections. However ... such repatriation would result in the loss of complete series and thus close off whole avenues of research and lose significant parts of the record of human diversity. Furthermore, it is these very rare items – for example the Duckworth has three Tasmanian skulls – that have the greatest intrinsic value, for they provide unique insights into human diversity, and of course are the most irreplaceable.’

105. The Working Group was told that there are circumstances in which remains could be returned. In a case of reburial there would be merit in taking samples and making 3D scans of the human remains.

106. At a meeting on 2 May 2003, organised by the Institute of Ideas and the Royal College of Physicians, a spokesman with research interests in this area noted: 'Clearly great hurt is felt by communities [seeking the return of human remains and] clearly there is great inequality' in the way in which claimant communities are treated today in the UK. He was quoted in *The Times* on 16 May as saying: 'There is also a lack of confidence in our colonial past that is the basis for much of these collections.' He said that he had no objection to returning recent specimens, to individuals with a clear kinship to the dead, but believed too that humanity as a whole had as good a claim to more ancient human remains.

107. Useful evidence was received from scientists who argued strongly in favour of working on remains only with the consent of communities of origin. The Working Group was told⁴⁰ that research could be rewarding in the involvement of indigenous people and there need be no conflict between them and the scientists. Only recently had scientists begun to ask Canadian indigenous communities for consent. Initially they refused, but attitudes were changing and they were progressively becoming happier with scientific work on human remains. It was predicted that the next generation would be more open. One researcher in bioarchaeology said that he would always ask for consent before undertaking research on human remains and that there was also an unwritten rule that further consent should be sought before the results of research were published. He would not work on samples without consent from indigenous representatives.

108. The Working Group heard from a director of an ancient biomolecules centre, who said that he was trying to encourage researchers from communities of origin to be interested in research on human remains. In principle he was keen to collaborate and consult. He was optimistic about how opinions were changing and agreed that dialogue with communities should be encouraged. In response to questioning, the Working Group learned that such views were thought to be typical of the younger generation of

40 On 12 June 2002.

researchers, and that attitudes were changing. One view was that in an extreme case the researcher would consider acting without the consent of communities of origin, but he would not make this decision alone. It would need a group decision by scientists and possibly need to be referred to an ethics committee. Another view asserted that if scientists could not justify the proposed research to indigenous people, then the work should not be done.

109. The Working Group was told that if a community of origin's feeling for repatriation (including cremation) was so strong as to cause it to insist on prohibiting research or retention then he would accept that. However, there is a difference between samples of different ages: a 2,000-year-old sample is different from a 50-year-old one. There is a need to consider the circumstances of collection of human remains as part of deciding whether it is acceptable to conduct research on them.

110. A written submission from the Vice-President of the American Association of Physical Anthropologists and Chair of its repatriation committee stated that 'when the remains of close relatives are involved (for example, in cases involving the historically documented remains of known individuals) it is clear that the desires of documented descendants should override any scientific interests in the remains. On the other hand, when a direct ancestor-descendant relationship is not clear, the value of the information on the history of our species provided by the continued availability of skeletal collections for scientific research will often outweigh any concerns remotely related modern individuals have over the disposition of these remains.'

111. The Working Group received a copy of an essay published by Professor Walker in 2000.⁴¹ In this, the author observes:

41 In M. Anne Katzenberg and Shelley R. Saunders, eds., *Bioarchaeological Ethics: A Historical Perspective on the Value of Human Remains from Biological Anthropology and the Human Skeleton*, (2000).

- ‘Human skeletal remains are more than utilitarian objects of value for scientific research. For many people, they also are objects of religious veneration of great symbolic and cultural significance.’⁴²
- ‘One approach to resolving disputes over research on ancient skeletal remains is to view such disagreements as cultural issues arising from competing value systems. Conceiving of disputes over the treatment of the dead as products of competing value systems avoids polemics and self-righteous posturing in which each side battles for moral superiority and instead promotes communication and mutual understanding. This can eventually result in the discovery of solutions that are consistent with the value systems of both parties in the dispute.’⁴³
- ‘On the one hand, we have bioarchaeologists who believe that the historical evidence obtained from human remains is critical for defending humankind against the historical revisionist tendencies of repressive, genocidal political systems, and, on the other, we have indigenous people who believe that the spirits of their ancestors are being tortured on the shelves of museums by racist, genocidal, colonial oppressors. If we can accept the relativist perspective that both of these views have some validity, then it is possible to envisage a compromise that gives due recognition to both value systems.’⁴⁴

112. The paper also observes that, among scientists, there appears to be ‘considerable agreement on a few fundamental rules that can be used to guide researchers who work with ancient human remains: (1) human remains should be treated with dignity and respect; (2) descendants should have the authority to control the disposition of the remains of their relatives, and (3) owing to their importance for understanding the history

42 Ibid. p 3.

43 Ibid. p 13.

44 Ibid. p 18.

of our species, the preservation of collections of ... human remains is an ethical imperative ... These ethical principles ... contain an inherent contradiction since recognising the rights of descendants may at times conflict with the preservation ethic.’⁴⁵ An example of a compromise acceptable to the Chumash Indians of Southern California and to universities and museums is offered: ‘Mutually acceptable solutions such as this ... are the outcome of personal relationships, mutual trust and respect, and the recognition of common interests. Such relationships require time to nurture.’⁴⁶ Professor Walker concedes that in some situations ‘it may be impossible to obtain a compromise that allows skeletal research to continue. However, from the personal experience I have had in working with many different groups of indigenous people, once the shroud of mystery associated with what osteologists actually do is removed through direct contacts between people, it is often possible to find a foundation upon which mutual understanding and co-operation can be built.’⁴⁷

113. The Working Group received written evidence from Colin Pardoe,⁴⁸ in the form of a paper written in the early 1990s, describing his experience of working with Australian Aboriginal communities to undertake research on human remains. The item summarised the processes of negotiation and discussion and, in his words, ‘good manners’ that he undertook. Community members had even agreed to destructive sampling. Reburial of remains after study, which Pardoe finds ‘personally distressing’ and ‘as a scientist’ disagrees with, is the norm. However, Pardoe is extremely positive about his experience. He asks, ‘Has my work as a scientist been curtailed or diminished as a result of Aboriginal control?’ and answers that it has not: ‘I have accumulated a vast database of material, more than enough to enthrall me for years to come. I have more remains in my laboratory at the moment than I have time to study. I have continued to publish scientific papers on a regular basis ... A scientific view of the world is not corrupted by advocacy,

45 Ibid. pp 19-20.

46 Ibid. p 30.

47 Ibid. p 31.

48 The President of the Australian Archaeological Association from 1999 to 2001.

or by an interest in the wishes of Aboriginal people. If I acknowledge Aboriginal ownership of their ancestors' bones, that is no different than asking permission to analyse bones from [museums in] France, Italy or wherever.'

114. The paper concludes: 'It is possible to accept an inclusive world view of knowledge and at the same time accept that cultures can somehow own their past; descendants can own the bones of their ancestors. There need be no tension between these views ... There are many [human] remains to tell us the story of human endeavour in Australia. With Aboriginal control and interest that story will be told.'

115. In a submission discussing collections of medical specimens, the British Medical Association suggested that disagreement about the future of particular human remains could be resolved by considering the harms and benefits of each option: 'Such harms and benefits should be considered in the broadest sense so that the interests of society at large, those of specific populations as well as those of individuals are examined. Differing cultural sensitivities and beliefs about human remains would clearly need to be taken into account. By this reasoning, one would need to take proper account of the interests of living relatives of recently deceased donors of human material who could be anguished by the retention or display of those human remains. Similarly a specific community may be offended by the retention of a human part of what they regard as their communal heritage (such as has occurred with the Australian aboriginal community who claim the return of their ancestors' remains). The degree of 'harm' or 'injury' experienced by such individuals or groups would need to be considered in relation to the perceived benefits, if any, for future society of retaining the material. In some cases, compromise may be possible by accurate models or replicas being made for display or small samples being retained in place of entire human remains. Other communities may welcome or be neutral about some form of display of human remains as long as due respect is shown (as in the case of saintly relics, for example).'

116. The World Archaeological Congress (WAC) wrote to the Working Group that its *First Code of Ethics* ‘acknowledges that the indigenous cultural heritage (including human remains) rightfully belongs to the indigenous descendants of that heritage. WAC acknowledges the right of communities to determine disposition and that repatriation of human remains to communities is an appropriate outcome. However, the *Vermillion Accord*⁴⁹ makes it clear that WAC considers mutual respect for the legitimate concerns of science and the legitimate concerns of communities the key factor in enabling acceptable agreements to be reached and honoured.’

The views of communities of origin

117. The distress and pain caused to some indigenous peoples by the presence of human remains in museums in England and Wales (and elsewhere) are summarised in Chapters 3 and 7.

118. The evidence presented here concentrates on arguments made to the Working Group about the future treatment of human remains.

119. The Working Group received evidence from indigenous peoples in Australia (including Tasmania), New Zealand and Hawaii. We did not directly receive evidence from indigenous groups in North America (neither from Canada nor the USA) although we did draw on information from others in North America, some of whom have extensive experience of working with indigenous people. Most, but not all, of the evidence considered here draws on Australian examples, simply because the Working Group received the greatest volume of evidence from Australia. This should not be taken as any reflection of the Working Group’s attitude towards evidence from elsewhere in the world.

120. The Aboriginal and Torres Strait Islander Commission (ATSIC) is a statutory

49 See Chapter 5 para 176.

authority of the Commonwealth of Australia, and a representative of the Australian High Commission in London accompanied its delegation. ATSIC is Australia's principal democratically-elected indigenous organisation; in 2000/01 ATSIC administered a budget of approximately \$AUS1.2 billion. ATSIC's submission took account of advice from a range of Australian government entities, including the Department of Foreign Affairs and Trade and the Department of the Prime Minister and Cabinet.

121. Points made on behalf of Aborigines and Torres Strait Islanders⁵⁰ include:

- 'The repatriation of indigenous human remains is of paramount importance to the traditional owners/custodians and relatives who are seeking a sense of closure to this period of history.'
- 'There are personal and spiritual feelings of attachment to remains as well as their cultural and historical significance ... Once the human remains are returned, a community can satisfy its spiritual needs and cultural imperatives to see that the dead have been treated with due respect and ceremony.'
- 'Only traditional owners/custodians have the authority to make decisions about the treatment of their ancestors. Within each community or group, only certain members of the group have the cultural authority to make those decisions. Handling of human remains must be done in an appropriate manner otherwise the person handling the remains becomes vulnerable and may be subjected to an unwelcome sanction. The remains of deceased people must be buried on land to which they have the strongest affinity otherwise their spirits will not be at rest.'
- The Working Group was told that return of human remains is essential for the health of the claimant community. People are grieving and will continue to grieve until the spirits of their ancestors are at rest. The forced absence of the remains of

⁵⁰ Submission and presentation, 18 December 2001.

ancestors damages the physical and psychological health, and indeed the social advancement, of indigenous communities.

- The view was expressed that in order properly to appreciate the importance of the return of human remains to indigenous people, it was necessary to meet Aboriginal people directly.⁵¹ Concern was voiced by the person expressing these views that his words, or indeed anybody's words, could not adequately convey what this whole question meant to the people he represented.
- Legislation should be introduced to 'make it illegal for collecting institutions in the UK to acquire and/or retain indigenous human remains and cultural items of significance (items of a secret/sacred nature).'
- 'The repatriation of indigenous human remains to their rightful communities should be unconditional and the traditional owners/custodians [should] have the final decision in the disposal of these remains and not collecting institutions.'

122. Written evidence set out eight principles:

- the support of governments in acknowledging indigenous ownership of remains and the role indigenous peoples should play in the decision-making process for returning them to Australia;
- the concept that the primary say in relation to what happens to remains rests with the traditional owners/custodians;
- the policy that regardless of whether remains are provenanced or not, remains should be returned to Australia for decisions to be made at domestic level;

⁵¹ The Chairman of the Working Group later accepted invitations to do so. See Chapter 1.

- the application of this policy not only to indigenous remains but also to other human tissue, burial artefacts and significant objects of religious and cultural representation;
- open access for traditional owners/custodians to information relating to remains held in overseas collecting institutions to allow them to make informed decisions about repatriation;
- support of collecting institutions that provide avenues for the repatriation of human remains on a domestic and international level;
- the discontinuation of research on indigenous remains and objects of a religious or ceremonial nature, without prior approval from traditional owners/custodians; and
- the support for traditional owners/custodians to accompany remains back to Australia.

123. The Working Group was also informed about the importance to Australian Aboriginals of the integrity of the body, including concerns about post-mortems, the retention of small samples of remains before return and DNA investigation. The clear differences between these views and those of some scientists are discussed further below.

124. At the same time, it was also observed that decisions were for individual communities to make. If it could be shown to a particular Aboriginal group that invasive scientific research on the remains of one of their ancestors would help the whole community, then that group might consent to the research.⁵² One view was that it would be perfectly acceptable to share with museums the results of research into provenance.

⁵² A spokesman acknowledged that reburial of human remains now could deprive future Aboriginal scientists of the opportunity to undertake such research on the human remains that were reburied.

125. It was stressed that it would take a considerable amount of time to research the provenance of human remains, which should not be rushed; people were keen not to be adversarial but to work cooperatively with museums, in a spirit of collaboration. Out of this dialogue future benefits would flow, such as ways of museums and their audiences benefiting from contemporary Aboriginal culture.

126. Arguments were made on behalf of Tasmanian Aboriginals⁵³ for the ‘unconditional return of all Aboriginal human remains to Aboriginal people’. This duty should be achieved through ‘mandatory legislation that immediately imposes a legal duty on institutions both public and private to give up remains in collections’. This should also apply to ‘burial artefacts and significant religious and cultural objects’.⁵⁴ ‘Prior approval from traditional owners’ should be obtained before undertaking any further research on ‘human remains and religious or ceremonial objects’.⁵⁵ As is so often the case in discussion about human remains, this position is clear and appears uncompromising.

127. In addition to these points, the Working Group was told that, in general, the Tasmanian community had taken the view that repatriation should be unconditional, but that they might be able to work with other suggestions. They also recognised that there might be merit in discussing ways in which their aims might be achieved through a more gradual process. There should be further discussion of a suggestion that Aboriginal communities could consider allowing institutions in the UK to keep some samples for future research purposes. It was explained that, although Aboriginal communities preferred unconditional return and no research, discussions about collaborative research might be possible. The fact that consent can be obtained to research Australian Aboriginal human remains is shown in the evidence above.⁵⁶

53 Presentation to the Working Group, 28 May 2002.

54 Ibid. p 4.

55 Ibid. p 5.

56 Paras 113–114.

128. It was also said that it would be beneficial to collaborate with UK museums on displays about Aboriginal history. The idea was welcomed given that many people outside Australia were under the misapprehension that Tasmanian Aboriginal people did not exist any more.

129. The Chairman of the Working Group, through the Head of the Cultural Property Unit at the Department for Culture, Media and Sport, invited the Tasmanian Aboriginal Centre (TAC) to respond to the following statement, made in a letter by a group of museums in the United Kingdom:

A further problem has been the possible lack of mandate vested in those individuals requesting repatriation. In particular, to remove particular genotypes from the possibility of scientific investigation is akin to a form of racism if not genocide, because those genotypes would be excluded from important ways in which we may continue to investigate and define our species. Arguably, therefore, the rights of (for example) mixed-blood descendants of now-extinct genotypes have not been fully taken into account, nor have their views been adequately canvassed.

130. The reply from the Tasmanian Aboriginal Centre in Hobart was as follows:

- The museums' comments do not raise any new issues. The comments put a new twist on an old argument, namely that scientists and not Aborigines have the greatest call over what happens to the tissue, body parts, cell structures and so on of the Aboriginal dead. This is apparent from the language used – “in which we [scientists] may continue to investigate” remains.
- Access to the human remains of Aboriginal people for genetic research is no different in nature to access for archaeological reasons. In both cases the issue is whether Aboriginal people are to have control of our heritage, culture and spiritual beliefs or whether this is all subject to the imposed desires of scientists. Our position has been made very clear on this point.

- Incidentally, having read the offensive language used by the museum submission, it is little wonder there is an increasing lack of sympathy for scientific research of us as a people. We are not animals to be described as ‘pure’ or ‘spoiled’ by inter-marriage. The use of such language reminds us of the Nazi era.
- We cannot resist saying the geneticists’ claim that Aborigines have no mandate to deal with the rights of our dead must be one of the best examples of pure hypocrisy we have heard for some time.

131. While the views of Aboriginal groups in Australia are fairly consistent, and accord with the practice of most museums in Australia and the Australian Government, the position in New Zealand appears more complex, with some divergent views among museums, Government and indigenous people. The National Museum of New Zealand, Te Papa Tongarewa (Te Papa) now houses some human remains returned from collections in the UK and elsewhere. The museum actively promotes the return of human remains to New Zealand. However, the response of native Maori appears not to be uniform. Some Maori who argue in favour of repatriation to New Zealand claim that Maori researchers are not allowed access to human remains housed at Te Papa, which is preventing research into provenance. One spokesman observed that he would prefer provenance research on Maori remains in the UK to be carried out in the UK in collaboration with Maori organisations. As noted above,⁵⁷ it was said that some younger Maori would want research to be undertaken on human remains.⁵⁸

132. It is useful to note the importance accorded by Australian Aboriginal groups to the joint Prime-Ministerial statement.⁵⁹ In the words of the TAC: ‘The public statement of the British Prime Minister of the willingness of his government to repatriate Aboriginal human remains to Australia is welcomed and supported. Mr Blair’s statement establishes

⁵⁷ Para 94.

⁵⁸ Also see Paul Tapsell in Fforde et al., *op. cit.* note 9.

⁵⁹ See Chapter 1 para 4.

the moral basis for this Working Group's recommendations as to how such repatriation will proceed ... We look forward to this Working Group's final report recommending the practical steps that can ensure the spirit of the Prime Minister's statement is implemented.'⁶⁰

133. A key and consistent point made in submissions from representatives of claimants is that custody in human remains should be vested in genealogical or cultural descendants and not in museums and other collecting institutions.

Other views submitted in writing: practices of museums, other collections and museum groups

Overseas and international

134. The issue of custody was raised with the Working Group by museums in Australia, New Zealand and the USA. In a letter,⁶¹ the director of the National Museum of Australia (NMA) wrote: 'Repatriation can include not only the physical repatriation of remains but also the repatriation of authority over remains. In engaging with indigenous communities and seeking their input, advice and guidance into the management of Indigenous remains one act of repatriation has already occurred. NMA encourages institutions within the UK to engage with indigenous communities and their representatives in a spirit of reconciliation.' The Director expects that this will lead to a wish to return remains; she continues: 'By far the greatest difficulty likely to face British museums and public institutions holding Indigenous Australian human remains is, having made the decision to repatriate remains, what to do next.' She here offers the advice and assistance of NMA and notes that NMA 'is the designated keeping place for remains for which communities or custodians cannot immediately be identified' under the terms of section 21(1)(c) of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

⁶⁰ TAC, evidence p 5.

⁶¹ Dated 21 September 2001.

135. For itself NMA has a Repatriation Unit ‘dedicated to the return of human remains and secret/sacred objects to Australian indigenous people’. The NMA’s *Policy on Aboriginal and Torres Strait Islander Human Remains* states:

- ‘While legal title under Australian law may be vested in the museum for all or some of the human remains in its custody, the museum considers that it has a moral obligation to return human remains to the relevant community upon request. This process includes providing communities with detailed information about relevant remains held by the museum.’ (para 3)
- ‘Researchers wishing to examine human remains in the museum’s custody must have written permission from the relevant community.’ (para 6.4)
- ‘All documentation relating to human remains in the museum’s custody shall be made available to relevant communities or to others who have their written permission for access to this information.’ (para 7.6)
- ‘Photography of human remains ... shall only be undertaken with the permission of the relevant community.’ (para 7.7)
- ‘The museum is committed to returning human remains to the relevant community upon request. The museum shall not place any conditions governing the future of those remains on the community to whom human remains are returned.’ (para 13)

136. The museum issues written guidance to those claiming the return of human remains and offers assistance with travel expenses for applicants to view the remains; visits to communities to discuss progress; assistance with funding for ceremonies associated with the final disposal of the remains; and assistance with obtaining more detailed advice into characteristics of the remains. The NMA also makes scientific information available to claimants in plain English.

137. Museum Victoria's policy on the management of Aboriginal skeletal remains similarly states: 'The museum acknowledges that the Aboriginal people are the rightful owners of their heritage and should be given responsibility for its future control and management.'⁶² In other respects, such as unconditional return and community consent for research access, the policy of Museum Victoria is consistent with that of the National Museum of Australia.

138. Te Papa 'actively seeks to repatriate human remains ... where provenance can be identified, Te Papa recognises the interests of indigenous peoples in their ancestral remains. ... Te Papa does not recognise the Maori and Moriori human remains it holds as artefacts or collection items. Te Papa recognises that these human remains have an ongoing connection with the peoples and cultures from which they originate. These remains are regarded as ancestors and will remain in the care of Te Papa until such time as matters of provenance and long term care have been discussed and agreed upon with Maori/Moriori.'

139. As far as UK museums are concerned:

Te Papa believes that the retention of Maori and Moriori remains in UK museums and institutions can only further contribute to a lack of understanding on a cross-cultural basis. This is inconsistent with the role of museums as advocates for understanding cultures. It has been demonstrated in a number of circumstances that the repatriation of human remains can and does lead to enhanced relationships between museums and indigenous communities. It is also critical to note that repatriation of human remains has not resulted in an increase in calls for the return of all relevant cultural material. Te Papa acknowledges that ancestral remains held within the collections of museums and institutions in the UK have ongoing scientific value to the museum community. However, before museums can keep any human remains based on their research value, the museum must first

62 Para 1.1.1.

be able to prove its claims of ongoing scientific value, to the satisfaction of the relevant communities from which those remains originated.

140. Karl Gilles, collections manager at the Southland Museum and Art Gallery in New Zealand, wrote that its extensive holdings of Maori human remains ‘are housed in a special non-public repository within the museum. They are managed by myself and our curatorial services, but by mutual agreement are under special control of the Maori tribal authority to which they are provenanced, namely Te Runanga o Hgai Tahu.’

141. As at NMA, requests for access are passed to the appropriate Te Runanga o Hgai Tahu advisory committee, as are final decisions on transfer of human remains.

142. The Auckland War Memorial Museum wrote that in the late nineteenth and early twentieth centuries, large numbers of Maori and Chatham Islands human remains were traded between the museum’s curator and others and museums and medical institutions in the UK, in exchange for old world antiquities and other items of interest to New Zealand museums. These remains originated from burial sites throughout New Zealand without the permission of the descendant communities. The museum now intends to seek to identify the current locations of these remains in UK museums and assist in their return to source communities.

143. The effect in the USA of the Native American Graves Protection and Repatriation Act is discussed in Chapter 5 and Appendix 10. Here, it is useful to quote the Collections Policy of the National Museum of the American Indian, part of the federally-funded Smithsonian Institution: ‘The National Museum of the American Indian is committed to the proper disposition, in accordance with the wishes of culturally based Native Americans, of Native American human remains of known individuals, human remains of individuals who can be identified by tribal or cultural affiliation with contemporary Native peoples, funerary objects, communally owned Native property and ceremonial and

religious objects.’ In particular, ‘The museum will repatriate any human remains that are reasonably identified as being those of a particular individual or of an individual culturally affiliated with a particular American Indian tribe upon the request of living descendants of the individual or of the particular tribe or organisation.’

144. The *Code of Ethics of the International Council of Museums*, and in particular Article 6.6 relating to human remains, was considered by the Working Group. This provision is set out in Chapter 5.⁶³

145. UNESCO wrote to the Working Group that it was aware of the potential for obtaining future scientific information from human remains; ‘however, the desire to obtain such information must be settled with communities whose wishes in this respect should not simply be ignored. While there have been cases where no resolution has been found satisfactory to both sides, in other cases negotiations, sometimes long and painful, have led to a compromise accepted by all sides. Such discussions, based on respect for the differing perspectives of cultures, would be encouraged by UNESCO ... UNESCO urges flexibility and sees the process itself of revising the way museums manage their collections of human remains as an opportunity for improving cultural awareness around the world.’

England and the rest of the United Kingdom

146. As shown in Chapter 5, a number of English museums and institutions have returned human remains to their communities of origin, demonstrating a high level of support and sympathy for claims and requests for return. However, it is important to note that most of the submissions of evidence from UK museums came from museums that have not been active in returning human remains, and so do not give a properly balanced picture of the attitudes of UK museums.

63 Para 179 et seq.

147. The policy sent to the Working Group by the Marischal Museum (University of Aberdeen) is perhaps characteristic of many UK museums: ‘Any request ... by persons seeking rights over the collection or repatriation of parts of the collection to their place of origin should be judged on its merits, taking into consideration background factors ... the character of the material in question, the character of the persons concerned and the circumstances of the request. Such consideration should take account of the Museums & Galleries Commission *Restitution and Repatriation: Guidelines for Good Practice* (2000). If the request concerns human remains or “sacred” objects it should be responded to with proportionately greater sensitivity.’

148. The policy of the National Museums of Scotland (NMS) on human remains states: ‘(1) NMS is responsible for preserving material concerning the whole human species; (2) Human remains are preserved with great care and respect; (3) Undertakings can be given neither to display such items nor to loan them to other sites where similar conditions cannot be guaranteed. All decisions relating to the disposal of human remains are referred to the NMS’s board of trustees and considered on a case by case basis, taking due account of the advice of the museum’s professional staff.’ The NMS explained in written evidence: ‘The museum has received several requests for the return of human remains and these have been put to the Board of Trustees. In no instance has this resulted in the disposal of items from the collections ... NMS feels that the current policy documents and legal status of the collections [under the National Heritage (Scotland) Act 1985] allow for the thorough investigation of any request, while also giving flexibility to respond to each request individually and imposes no restriction on the potential outcomes of each case. For example the return of human remains would be possible if it met the terms of the disposal policy and the trustees and Secretary of State were to agree. The policies and legislation limit the circumstances under which disposal may take place and we feel these limitations are entirely appropriate.’⁶⁴

149. An accompanying statement headed *Human Relations in NMS Zoological*

⁶⁴ Note from Working Group member, Dr. Maurice Davies: the Director of the National Museums of Scotland has stated that NMS intends to review its policy on human remains following publication of this Report.

Collections made a number of further points, including the following:

'Although NMS does not have an active research programme involving the human remains held in the department of geology and zoology, the scientific collections are held on behalf of wider scientific eventualities as part of an international resource network ... There is no doubt that human remains ... potentially contain information that may be used to answer scientific questions, some of which have not yet been asked. Thus there is no way of knowing how important it may be to be able to investigate them ... Whether or not it has been made clear that destruction will be the result, recent requests for 'repatriation' of human remains have not provided a guarantee that the remains will be held in such a way that they will be potentially accessible for scientific investigation in perpetuity ... A distinction should be made between the remains of known individuals and the remains of unknown individuals. The case for repatriation (and probable destruction) of the remains of known individuals, particularly if made by actual descendants of proven relatives, is undeniably stronger than that for unknown individuals. The same might be true of human remains demonstrably 'collected' through a specific and documented atrocity.'

150. A final, more general point made is: 'Some holdings of human remains in smaller museums and university departments may now be regarded as embarrassing anachronisms given current collecting policies. However, these remains may have significant scientific value and should not be repatriated for destruction simply because they are no longer appropriate to the collection in which they are currently held. We suggest that a limited number of centres be recognised (based mainly on national museums), where material could be sent for assessment and possible retention in appropriate research collections.'⁶⁵

⁶⁵ Working Group on Human Remains submission 10: 'Human Remains in National Museums of Scotland Zoological Collections'.

151. To an extent contrasting with the National Museums of Scotland, National Museums and Galleries of Wales (NMGW) sent a statement to the Working Group that for human remains of foreign origin ‘where provenance can be established, the material can, under current policy, be repatriated’. The museum’s policy states: ‘The NMGW will always seek, within the limits of its powers, to return human remains where the material is not of scientific importance or where ethical considerations are seen to be of overriding importance. In general ethical considerations are likely to arise where the material is very recent and a clear link with living individuals or a living population can be established.’

152. The *Policy on Human Remains*⁶⁶ of the Natural History Museum (NHM) sets out the restrictions on disposal in the British Museum Act 1963 and cites the museum’s general policy on disposal which states: ‘Any decision to dispose of a registered object will be taken only after due consideration. The museum will assess all material considered for disposal in terms of its scientific, historical and cultural importance; the needs of both present and future users; and the legal and ethical issues as they relate to that material.’ On the return of human remains in particular the NHM policy states: ‘The museum has very limited power to return human remains to their countries of origin on a permanent basis, owing to the constraints on disposal of items from the collection. This is combined with a strong presumption against disposal that arises from the recognition of the scientific value of maintaining a collection of human remains as a resource for active research.’ The NHM policy also states:

‘While there is continuing scientific value in a collection of human remains, and it should continue to be the focus of active research, the museum also recognises that the discourse on human remains is framed more widely. The museum recognises that there is a need to enter discussions and to work with recognised institutions and organisations in those countries where there is indigenous community demand for the return of human remains from collections, and

66 Reproduced in Appendix 6.

demands for a role for indigenous peoples in determining the use of remains in museums. Such collaboration aims to provide better information on the museum's work, to learn from the experience of others and to try to develop mutually acceptable solutions in areas where there are conflicting views.'

153. The Museum Ethnographers Group (MEG) said that it 'anticipates that a most welcome outcome of the deliberations of the Working Group will be a more general recognition and acceptance of the depth of feeling that exists, particularly but not solely on the part of actual or cultural descendants, that the specimens which are now 'human remains' were once people, with relationships with others that are still meaningful within the communities in which they lived'. Other points made by MEG include the following: 'Where the statutes relating to the decision-making powers of museum governing bodies disbar them from agreeing to the removal of human remains from collections, MEG recommends that the Working Group should support legislative change to make this possible. The broad approach should be to allow appropriate weight to be given to the rights and views of source communities relating to human remains formerly in their care. ... At the very least, the current situation which allows some museums to ignore the need to even discuss the issues surrounding return of human remains must be changed.'

154. Other museums, including the Pitt Rivers Museum, made a number of detailed suggestions concerning the treatment of human remains and requests for clarification of the permissibility of restricting access under legislation. We have tried to take most of these points into account elsewhere in the Report.

155. An important point made by some UK museums and also by some scientists is that disagreement about human remains of overseas origin is tending to affect attitudes to human remains of UK origin, the treatment of which is generally uncontentious.

Associated objects

156. Several submissions referred to associated objects. The Auckland War Memorial Museum indicated that it would seek the return from the UK of *taonga* (treasures) discovered alongside human remains. The TAC recommended that the Working Group should include ‘within its definition of human remains, other human tissue, burial artefacts and significant religious and cultural objects’. Many of the museums cited above, including some UK museums, return significant cultural material as well as human remains. ATSIIC stated that they regarded the documentation associated with human remains as associated material and argued that it should be included in any reforms directed at claims for return.

157. The MEG advised caution on associated objects, especially the need to achieve an acceptable definition (on which there should be detailed consultation). We acknowledge the need for a generally agreed definition of associated objects and discuss this in Chapter 8,⁶⁷ where we also discuss our conclusions about the best way forward with regard to the return and treatment of associated objects.

Conclusion

158. The Working Group believes that consensus can sometimes be reached among museums, scientists and descendants concerning the treatment of human remains in collections. In many cases consensus already exists. For example, some remains have been returned without any substantial apparent detriment to the interests of museums or science. Conversely, many categories of remains are retained by museums and used by scientists without objection from descendants.

159. It is, of course, impossible to disregard the dissension (even mistrust) that emerges from some of the opinions heard and read by members of the Working Group.

⁶⁷ Para 388 et seq.

We take these differences seriously. But other evidence suggests that disagreement can be relieved by dialogue, and that dialogue can produce consensus, even in cases that seem, at first sight, complex or intractable. Such results depend, however, on a willingness to hear and respect other positions, to recognise that they are sincerely held, and to set aside time to consider them. We believe that parties should work on the principle that informed consensus is the desirable outcome, and should act transparently and honestly to achieve this. Such an approach has the potential to generate otherwise unachievable benefits of continuing long-term collaboration for museums, scientists, descendant communities and humanity as a whole.

160. In many (if not most) cases it will be possible to reach a conclusion that is broadly acceptable to the main interested parties. In general we believe that the process of reaching consensus will be much helped by giving all parties access to a process that evaluates and advises on claims transparently, consistently and fairly. This is discussed in more detail in Chapter 11, while in Chapter 9 we set out some fundamental principles that we believe should inform the discussion of all future care, treatment and return of human remains in UK collections.

Chapter 5: Progress and parallels

General

161. This chapter gives an account of modern developments in two fields of restitution: the return of human remains by English and other museums, and the return of historic artefacts. Consideration of these developments has helped us to evaluate the evidence presented to us and to distil general principles for future conduct.

Human Remains

Recent returns of human remains by UK museums and other collections

162. Human remains have been delivered to claimant groups from UK museums and other collections on several recent occasions.

163. **Royal College of Surgeons.** In 2001, the Royal College of Surgeons in London revised its policy on repatriation to permit consideration of requests from tribal or other recognised representative bodies in North America and Australia. Following this revision, the College reviewed earlier requests that it had received from Australia and Tasmania, and took the initiative of contacting both the Tasmanian Aboriginal Centre and the Aboriginal and Torres Strait Islander Commission (ATSIC) in order to make arrangements for repatriation.⁶⁸ In 2002 the College delivered pieces of Truganini's hair and skin in London to a delegation from the Tasmanian Aboriginal Centre, which took them to Tasmania for a ceremonial burial. The identity of these items within the College's collection had been discovered only in January 2002. Mr Rodney Dillon, the Tasmanian Commissioner for ATSIC, said that the return of expatriate remains was necessary 'so these people can rest and the community can rest too.' On 9 April 2003, the College delivered further items to a delegation that included representatives of ATSIC

⁶⁸ Jane Weeks and Val Bott, *Scoping Survey of Historic Human Remains in English Museums Undertaken on Behalf of the Ministerial Working Group on Human Remains* (2003) para 6.6.

and the Foundation for Aboriginal and Islander Research Action (FAIRA). These items consisted of the remains of approximately 60 Aboriginal people. In a statement delivered on that occasion, Sir Peter Morris, President of the Royal College of Surgeons, said:

Today sees the culmination of a very fruitful and positive dialogue between the Royal College of Surgeons of England and the Aboriginal and Torres Straits Islander Commission (ATSIC) and its recognised agency the Foundation for Aboriginal and Islander Research Action (FAIRA). In May last year the College returned human remains to Tasmania through the Tasmanian Aboriginal Centre and this handover completes the process.

I am sorry not to be present in person to make the handover but as President of the College and an Australian I am particularly pleased to welcome representatives from ATSIC and FAIRA to the College for this significant event.

We have come to recognise that the culture of the Aboriginal Australian is very different from British culture. It is very important to an Aboriginal Australian that their body, and their ancestors' bodies, are returned to the land from which they arose. Staff from the College and FAIRA have been working together over the last year to identify correctly the Aboriginal remains in the Museum's holdings so that they can be returned to the right community and location. If not, the Aboriginal Communities will decide where best they should be laid to rest.

When I was last in Australia I visited the new galleries at the National Museum of Australia and was impressed by the displays of Aboriginal culture planned with the involvement from the Aboriginal communities. Understanding different cultures is the way forward and as our museum here in the College is currently undergoing a change of direction – I look forward to continuing dialogue on cultural issues.

164. At a meeting held before the handing-over ceremony on that occasion, attended by Mr Richard Andrews, Counsellor and Head of the Political and Trade Policy Branch at the Australian High Commission in London, and the Chairman of the Working Group, members of the Aboriginal delegation expressed the following opinions, which they asked the Chairman to convey to the Working Group:

- ‘The people responsible for bringing our ancestors’ remains here must also be responsible for bringing them back. This includes finding the necessary money.’
- ‘Return must be accompanied by proper ceremonies.’
- ‘Return must include soft tissue and ceremonial objects as well as skeletal remains.’
- ‘Spirits must be free from the white torment that arises from keeping our ancestors in boxes and plastic bags and other wrongful ways. They must be freed by being given customary last rites.’
- Quiescence for the dead is essential for the living to be at rest. After the barbarities inflicted on them, our ancestors must be at rest, and so must we.’
- ‘Past and present conduct in connection with remains has been distasteful and disgusting. Why are we the only people not allowed to reclaim and bury our dead? It is obscene.’
- ‘And what benefit do indigenous people get?’
- ‘Everything has to come back, including grave goods. We want the ownership issue resolved. We don’t want to go back to confrontational methods.’

- ‘The people who are abusing our ancestors’ bodies are making a good life for themselves through salaries, research grants, appointments and promotions.’
- ‘It’s our *direct* ancestors that are being experimented on.’
- ‘We went to the Natural History Museum to see our ancestors and we were told that we cannot see them. For us it is like going to see somebody in a hospital. To us the people in the museums are not dead, they are living.’
- ‘How can research possibly compare? We’re tired of other people interpreting us to ourselves.’

165. **Manchester University.** On 29 July 2003, the Manchester Museum handed four Aboriginal skulls to a delegation of Aboriginal elders, for repatriation to their traditional homeland in Victoria and to a sacred keeping-place in the Australian Capital Territory. The hand-over followed an agreement between Manchester University and FAIRA. A traditional custodian from the Ngarrindjeri nation in South Australia, Major Sumner, said that ‘We now put an end to the torment.’ The Director of the Museum, Tristram Besterman, described the return as a contribution to the removal of the sense of dispossession and outrage felt by Aboriginal people. He said:

The return of the remains of the ancestors of living indigenous Australians is an act that recognises our common humanity. These remains were removed during the colonial era at a time of great inequality of power. Their removal more than a century ago was carried out without the permission of the Aboriginal nations, and they have been held in the Manchester Museum ever since, in violation of the laws and beliefs of indigenous Australian people. The Manchester Museum cannot atone for the wrongs of our own forebears at a time when different values prevailed. Nonetheless, by returning these remains now, we hope to contribute to ending the sense of outrage and dispossession felt by Australian Aborigines today,

and trust that we can begin to build a more rewarding relationship based on mutual understanding and respect between our peoples in the future.⁶⁹

166. On the following day, a leader column in *The Times* newspaper commented that ‘physical remains can have a human and spiritual dimension that transcends the scientific imperative. When a case can be proved, those remains should be laid to rest in their native place.’⁷⁰

167. **Edinburgh University.** In 1998, certain *mokomokai* (tattooed heads) from an 18th-century collection were returned to their ancestral homeland by the physical anthropology museum at Edinburgh University. They are now housed in a sacred place within the National Museum of New Zealand Te Papa Tongarewa.⁷¹

168. **Horniman Museum.** On 2 August 2003, the Horniman Museum, following an undertaking given some ten years earlier, handed over six items of human remains to Major Sumner and Rubena Colbey, a researcher employed by FAIRA. The removal was preceded by appropriate documentary research and accompanied by appropriate ceremonies.

Central and local government and the courts

169. Developments within public authorities other than museums show some sympathy for repatriation claims. There is evidence of a revision, or at least a reappraisal, of attitudes to claims for relocation.

170. **The Home Office.** The Home Office (HO) receives a substantial and increasing number of requests for the exhumation and relocation of deceased persons, mostly to destinations within the United Kingdom but sometimes to overseas destinations. It issues

69 See *Manchester Museum News*, August 2003 at <http://museum.man.ac.uk/information/newsflash.htm>

70 *The Times*, 30 July 2003, p 17.

71 See para 245.

exhumation licences at a current rate of about 1,300 a year, plus another 200 which relate to archaeological sites.⁷² There are also a number of requests relating to historical figures, such as the ongoing one for the return of the remains of Pocahontas, or the successful repatriation to the USA in 1997 of the remains of Long Wolf, a Sioux Indian Chief who had died in the UK in 1892 while touring with Buffalo Bill's Wild West Show. At the time of its oral evidence to us, the HO was about to undertake a review of both coroners' law and burial law.⁷³

171. The past few years have seen further requests for the return and reinterment overseas of renowned historical figures. One example is the Brazilian request, resolved by the decision of the Consistory Court for the Diocese of Oxford.⁷⁴ Another is the petition for the return to Moscow of the remains of Anna Pavlova from their current place of repose in Golders Green. The petitioners ultimately discontinued this application.⁷⁵

172. These developments may reflect an increasing global demand for the relocation of the remains of distinguished national figures. An example not affecting the United Kingdom is the recent demand for the return of the remains of Saint Nicholas from his burial site at Bari in Italy to his birthplace in Turkey.⁷⁶ Such claims are not new, as can be seen from the competitive manoeuvres of rival US towns seeking to become the place of interment of such historic figures as William Cody and Jim Thorpe.⁷⁷ In 2002 the remains of Alexandre Dumas were removed from his grave at Villers-Cotterêts in north-eastern France and transferred to the Panthéon at Paris, following a decree of President Chirac.⁷⁸

72 Oral evidence of Mr Robert Clifford, Home Office, to HRWG, 18 December 2001.

73 *Death Certification and Investigation in England, Wales and Northern Ireland – the Report of a Fundamental Review 2003* was published on 4 June 2003 (Cm 5831). A consultation paper on burial law is now expected to appear in Autumn 2003.

74 *In re St Mary the Virgin, Hurley*, [2001] 1 WLR 831; *The Times*, 26 January 2001. See further below and, for a longer summary of this case, Appendix 4.

75 *The Times*, 9 March 2001.

76 *The Times*, 4 January 2003.

77 Edward Murphy, *After the Funeral: The Posthumous Adventures of Famous Corpses* (1995) Citadel Press, Chapters 27, 32 and passim.

78 *The Times* 25 July 2002. See further, as to a proposal to relocate the remains of George Sand to the Panthéon, Gillian Tindall, 'Ashes to ashes, sand to sand' *Guardian Review*, 13 September 2003.

173. **Cultural diversity in funeral practice.** English law safeguards the rights of people to treat their dead according to their own religion and culture.⁷⁹ Beliefs and traditions are honoured to the extent that their violation may be illegal as well as socially unacceptable. The Jewish community responded strongly to the excavation at Jewbury in York, demanding immediate reburial and cessation of further archaeological activity.⁸⁰

174. **Judicial decision.** The Consistory Court for the Diocese of Oxford recently sanctioned a request to repatriate the remains of a distinguished deceased Brazilian from a churchyard grave in England to a specially constructed monument in Brazil.⁸¹ The removal occurred with the consent of the church authorities and the court invoked the doctrine of comity of nations as one reason for its decision. Other recipients of petitions for repatriation may find it appropriate to consider the impact of their response on international goodwill, where this does not conflict with their governing instrument.

Professional instruments

175. Numerous professional documents have sought to provide guidance on ethical issues relevant to human remains in museums.

176. The *Vermillion Accord*, adopted in 1989 at the World Archaeological Congress, is significant as the first international agreement to provide for respect for all human remains, irrespective of origin, race, religion, nationality, custom or tradition (the full text of the Accord is reproduced in Appendix 5). It further provides not only for respect for the wishes of the dead, but also for those of the local community, relatives or guardians of the dead, balancing this with respect for the research value of human remains. It calls for negotiation based on ‘mutual respect for the legitimate concerns of the communities

79 See *Halsbury's Laws of England*, volume 8(2) (4th Edition Reissue and Cumulative Supplement, 2003) para 157 and volume 20 (4th Edn. Reissue, 2003) para 1059. See also *Re Crawley Green Road Cemetery, Luton* [2001] Fam 308.

80 M. Parker Pearson, ‘Towards a code of ethics for human remains in the British Isles, unadopted proposal, from *Ethics and the Dead in British Archaeology*’, in *The Field Archaeologist* 23(2002) pp 17-18.

81 *In re St Mary the Virgin, Hurley*, [2001] 1 WLR 831.

for the proper disposition of their ancestors, as well as the legitimate concerns of science and education'.⁸² Our recommendations are likewise intended to encourage negotiation based on mutual respect.

177. In 1991 the Museum Ethnographers Group (MEG) produced a set of guidelines dealing with the storage, display, interpretation, loan and return of human remains in UK ethnographical collections.⁸³ The guidelines recognise that there are differing attitudes to death and human remains among cultural groups and over time, and suggest that requests for the return of human remains should be assessed on a case-by-case basis, involving consideration of 'ownership, cultural significance, educational and historical importance of the material, the cultural and religious values of interested individuals or groups and the strength of their relationship to the remains in question.' Elsewhere the guidelines propose standards of treatment for human remains retained by museums.

178. The document *Restitution and Repatriation: Guidelines for Good Practice*,⁸⁴ published by the Museums & Galleries Commission, offers practical guidance for those who are called on to deal with claims for repatriation in general. It sets out in detail the arguments which might be advanced for and against return in a particular case, and the reasons which may underlie a request for return. The document also outlines the procedures and standards which museums should observe in considering such requests. It reminds museums that the return of material may be requested by cultural groups in order to ensure that 'their spiritual needs and those of the material are met'. And it specifically recommends that museums seek to understand the reasons behind requests, which 'will help when working with the requesting party towards a satisfactory outcome'.

179. The International Council of Museums (ICOM) produced a revised *Code of Professional Ethics* in 2001. Article 6.6 provides general guidance for museums across a

⁸² Para 5 thereof.

⁸³ Subsequently updated: Museum Ethnographers' Group, 'Professional guidelines concerning the storage, display, interpretation and return of human remains in ethnographical collections in United Kingdom museums', in *Journal of Museum Ethnography* 6 (1994).

⁸⁴ J. A. Legget, *Restitution and Repatriation: Guidelines for Good Practice* (2000) London: Museums & Galleries Commission.

broad field of conduct involving human remains (and material of sacred significance). Such conduct includes housing and maintenance, availability for study and research, care and use, exhibition, replication and publication, and response to requests for removal from display and for return.

180. It states: ‘Collections of human remains and material of sacred significance should be housed securely and respectfully, and carefully maintained as archival collections in scholarly institutions. It should be available for legitimate study on request. Research on such material, its housing, care and use (exhibition, replication and publication) must be accomplished in a manner consistent with professional standards and the interests and beliefs of members of the community, ethnic or religious groups from which the objects originated. When sensitive material is used in interpretative exhibits, this must be done with great tact and with respect for the feelings of human dignity held by all peoples.

181. With respect to removal and return, it goes on to say: ‘Requests for removal from public display of human remains or material of sacred significance must be addressed expeditiously with respect and sensitivity. Requests for the return of such material should be addressed similarly. Museum policies should clearly define the process for responding to such requests.’

182. The *Code of Ethics for Museums* published by the Museums Association in 2002⁸⁵ requires members to refer to the guidelines on human remains issued by the Museum Ethnographers’ Group, and to ‘deal sensitively’ with requests for repatriation, having regard to the law, ‘current thinking on the subject’ and ‘the interests of actual and cultural descendants’. The foreword to the *Code* states that: ‘Professional ethics, by definition, should serve the public interest by encouraging behaviour that benefits the communities

⁸⁵ Museums Association *Code of Ethics for Museums* (2002) London: Museums Association (www.museumsassociation.org). See further the Canadian Museums Association’s Ethical Guidelines (1999) paras E 4.1 and E 4.4, reproduced in this Report at paras 227–228.

served by a profession and prohibiting activities that may cause harm to any of those communities.’ In a later passage it is stated that the *Code* expects museums to ‘inform originating communities of the presence of items relevant to them in the museum’s collections’, to ‘respect the interests of originating communities with regard to elements of their cultural heritage present or represented in the museum’, and to ‘dispose of human remains with sensitivity and respect for the beliefs of communities of origin’. Elsewhere the *Code* requires members to keep abreast of legal developments, museum practice, social policy and public expectations.

Individual institutions codes and ethical guidelines

183. Some of the institutions that hold important collections of human remains have disclosed in evidence to us their formal policy statements. Two of these statements, from the Duckworth Laboratory at the University of Cambridge and the Natural History Museum in London, are reproduced in Appendix 6.

184. From the policy published by the Duckworth Laboratory, we observe the following proposition: ‘It is the policy of the Duckworth Laboratory ... to return any individual skeletons or skulls of named individuals if their close kin should want them (or where it may be possible to ascertain who they were).’⁸⁶

185. The latter part of this statement suggests constructive possibilities for future cooperation. It accords, we believe, with our general conviction that each party to a potential claim should be prepared to share the evidence at its disposal and collaborate in the examination of that evidence.⁸⁷

⁸⁶ This quotation is taken from the *Scoping Survey of Historic Human Remains in English Museums Undertaken on Behalf of the Ministerial Working Group on Human Remains* (2003), which can be found at http://www.culture.gov.uk/cultural_property/wg_human_remains.htm.

A policy document issued by the Duckworth Laboratory, which gives a slightly different position, can be found at Appendix 6. As to genealogical and cultural association generally, see Chapter 7.

⁸⁷ See further Chapter 10.

186. The current version of the *Policy on Human Remains* published by the Natural History Museum⁸⁸ identifies and provides a commentary on six policy objectives. These include the maintenance of a clear policy framework, of high standards in collections management, and of a high standard of documentation; the enabling of research on human variation, human origins, bioarchaeology and related subjects; and the giving of access to knowledge derived from the collection. The sixth and last policy objective is the aim to be ‘responsive to requests for dialogue on human remains’. The commentary on this objective recognises that ‘the discourse on human remains is framed more widely’ than scientific value and active research. It acknowledges a need on the part of the Museum to confer and work with recognised institutions and organisations in countries whose indigenous communities demand the return of human remains from collections. The aims of such collaboration are broadly defined: ‘to provide better information on the Museum’s work, to learn from the experience of others in this context, and to try to develop mutually acceptable solutions in areas where there are conflicting views’.

187. The Natural History Museum further expresses its general willingness to discuss a spectrum of issues such as return, the development of information resources, systems of care, access for nonscientists and other matters ‘as they may be raised by others’.

International agreements

188. **Treaty of Versailles, 1919.** The UK has subscribed to at least one multilateral treaty that pledges the return of specific human material. In the particular case, the treaty designated the UK Government as the recipient of the relic, though the alleged removal was from Africa. By Article 246 of the 1919 Treaty of Versailles: ‘Within six months of the coming into force of the present Treaty ... Germany will hand over to His Britannic Majesty’s Government the skull of the Sultan Mkwawa, which was removed from the Protectorate of German East Africa and taken to Germany.’

⁸⁸ See Appendix 6.

189. It is uncertain whether this obligation was observed or, indeed, whether the Sultan's skull was originally removed to Germany.⁸⁹ The provision is unusual and seems unlikely to afford immediate general guidance. Even so, Article 246 shows what ascendant governments can achieve when political and other conditions permit.

190. **United Nations Draft Declaration on the Rights of Indigenous Peoples; UNIDROIT and UNESCO instruments.** We have taken account of several more recent international instruments. These include the United Nations Draft Declaration on the Rights of Indigenous Peoples (1993); the UNIDROIT Convention on the Return of Stolen or Illegally Exported Cultural Objects (1995), to which the UK is not a state party; the UNESCO Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples (1997); the recommendations of the UNESCO World Conference on Science (1999); and the UNESCO Convention on Underwater Cultural Heritage (2001), to which the UK is not a state party.

191. Article 13 of the United Nations Draft Declaration provides that indigenous peoples have the right to the repatriation of human remains. This article also provides that states 'shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.'⁹⁰

192. Article 2 paragraph 9 of the UNESCO Convention on Underwater Cultural Heritage requires that 'States Parties shall ensure that proper respect is given to all human remains located in maritime waters.' Rule 5 of the Rules Concerning Activities Directed at Underwater Cultural Heritage, which are integral to the UNESCO Convention on Underwater Cultural Heritage, require that 'Activities directed at underwater cultural

89 See correspondence in *The Times* 13, 18, 21 June 1998; Norman Palmer in *Current Legal Problems* 477 (2001) p 519.

90 See generally Patrick Thornberry, *Indigenous Peoples and Human Rights* (2002) Manchester, Juris, pp 25-26, 370-376.

heritage shall avoid the unnecessary disturbance of human remains or venerated sites.’⁹¹

193. Taken collectively, these and other instruments acknowledge, in variable form, a responsibility on governments, institutions and the scientific community to deal respectfully with human remains and to respect the rights, interests and beliefs of indigenous peoples and communities of origin. They also affirm that respect shall be accorded to mortal remains universally, irrespective of origin, race, religion, nationality, custom and tradition. Although none of these international instruments is legally binding on the UK, they have collectively done much to create a climate of expectation amongst indigenous peoples worldwide and to encourage the perception that such expectation is morally justified.

Retained organs and the Department of Health

194. The Government has recently accepted the need to legislate on the question of human tissue and organs. This acceptance emerges primarily from revelations during 1999 and 2000 about the retention of human organs and tissue by hospitals and health authorities. The resulting Kennedy (Bristol)⁹² and Redfern (Liverpool)⁹³ inquiries showed that organs and tissue from children who had died had often been removed, stored or used without proper consent.⁹⁴

195. A report in 1999 by the Chief Medical Officer commissioned a census of all organs and tissues in NHS pathology services.⁹⁵ Although the survey and report focused

91 For discussion of these provisions, see Patrick O’Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention on Underwater Cultural Heritage* (2002) Leicester: Institute of Art and Law, Milltown, N J, pp 53-55, 162.

92 The Inquiry into the management of care of children receiving complex heart surgery at The Bristol Royal Infirmary, *Interim Report: Removal and Retention of Human Material* (2000).

93 Department of Health, *The Royal Liverpool Children’s Inquiry Report* (2001).

94 That these were not isolated revelations has been shown through a subsequent census and recent reports, that, in the past, there was widespread storage and use of organs and tissue by coroners, following post-mortems, where proper consent was not obtained. See the Department of Health, *Report of a Census of Organs and Tissues Retained by Pathology Services in England* by the Chief Medical Officer for England (see next footnote); and Department of Health, *The Investigation of Events that Followed the Death of Cyril Mark Isaacs* (2003), which focuses on the retention of adult brains following coroners’ post-mortems. It has become apparent that the current law in this area is neither comprehensive nor clear.

95 Chief Medical Officer, *Report of a Census of Organs and Tissues Retained by Pathology Services in England* (2001) London: HMSO.

on human material taken from UK post-mortems post-1970, the returns indicated large numbers of ‘archived’ or pre-1970 collections, several including material from the 19th century.⁹⁶ The Chief Medical Officer recommended the setting up of the Retained Organs Commission (ROC) to catalogue organs and tissue retained from post-mortems, and to ensure that these could be dealt with in accordance with relatives’ wishes.

196. In advice to the Government in 2001⁹⁷, the Chief Medical Officer recommended a fundamental and broad review of the law on human organs and tissues taken from adults or children (including foetuses and stillborn children) either during surgery or after death. A public consultation document, *Human Bodies, Human Choices*,⁹⁸ was launched in July 2002. The responses (in conjunction with associated workshops and a major national conference) enabled a large degree of consensus to be developed, which consensus formed the basis of proposals circulated in September 2003. A report on the consultation process had already been published in April 2003⁹⁹ and in the same month the Department of Health (DH) published an interim framework of materials that might (with appropriate revisions) help in due course to underpin legislation.¹⁰⁰

96 The returns confirmed that 196 trusts and 13 medical schools and postgraduate institutes held human organs or tissue. The survey identified the following ‘archived’ or pre-1970 collections: 47,300 organs or body parts, 2,700 stillbirths or foetuses and, 480,600 tissue samples. One medical school had archived specimens dating from the early 19th century, and several others had specimens from before 1900. The Chief Medical Officer commented op. cit., p 5 note 95) that ‘many of these were used for teaching, reference or research’ and that the views of family members, and the historical and educational value of the collections would need to be considered before decisions were taken on retention and disposal.

97 Chief Medical Officer, *The Removal, Retention and Use of Human Organs and Tissue from Post-Mortem Examination* (2001) Department of Health.

98 Department of Health, *Human Bodies, Human Choices: The Law on Human Organs & Tissue in England & Wales – A Consultation Report*, (2002).

99 Department of Health, *Human Bodies, Human Choices: Summary of Responses to the Consultation Report* (2003).

100 This consists of: (a) model consent forms, which are not required by law, for the retention of organs and tissue from post-mortems (whether performed by coroners or hospitals) where retention is not ordered by the coroner; (b) codes of practice relating to communications with families at the time of post-mortem; (c) codes of practice concerning the import and export of body parts; (d) an interim statement relating to the present law under which use is made of organs and tissues. See the model forms relating to post-mortem examination, Department of Health (2003); Department of Health, *Families and Post-Mortems: A Code of Practice* (2003); Department of Health, *The Import and Export of Human Body Parts for Non-therapeutic Uses: A Code of Practice* (2003) and Department of Health, *Interim Statement on the Use of Human Tissue and Organs* (2003).

197. We here quote from the September 2003 draft document:

Purpose of future legislation

198. The purpose of future legislation would be to provide a consistent legal framework for all issues relating to the taking, storage and use of human organs and tissue. Its aim would be to strike an acceptable balance between, on the one hand, the rights and expectations of individuals and families, and on the other, considerations such as the importance of research, education, training, pathology and public health surveillance to the general population. In practice it should ensure the continuance of crucial activities in a climate of public confidence.

Key points to be covered by future legislation

199. Future legislation might provide:

- a) that consent be the explicit, underpinning principle when considering the removal, storage and use of human bodies, body parts, organs and tissue;
- b) that there should be no financial gain from the human body and its parts;
- c) for a regulatory framework including an overarching authority whose responsibility might include licensing and inspection of regulated activities;
- d) for penalties in relation to certain activities which are performed without either consent or the requisite licence (including DNA testing);
- e) that statutory codes of practice be issued in relation to such matters as:
 - i. conduct of post-mortems and anatomical examinations,
 - ii. import and export of human body parts,

- iii. communication with families about post-mortem examinations,
- iv. definition of death,
- v. disposal of human tissue; and

f) that human organ transplantation continues to operate broadly under current arrangements, but within the new legislative framework.

200. It is *not* anticipated that the following would be affected by new legislation:

a) activities involving the taking of tissue associated with 'everyday life' such as hair or nail clippings, except in relation to the proposed new offence of 'DNA theft';

b) the current legal position relating to there being no property in a human body or its parts, except where there has been the application of human skill;

c) the collection of blood, and processing and supply of blood and blood products for human use, already regulated under an EC Directive;

d) matters regulated by the Human Fertilisation & Embryology Act 1990;

e) xenotransplantation (animal to human transplants), which is overseen by the United Kingdom Xenotransplantation Interim Regulatory Authority; and

f) activities which have taken place in the past as the Bill would not have retrospective effect.

201. The Working Group has conferred closely with the ROC and the DH in order to avoid potential overlap and ensure consistency of approach. At the outset, a pragmatic demarcation was agreed, whereby the DH and the ROC would concentrate on human remains acquired by institutions post-1948 (when the National Health Service was set up)

and those obtained from post-mortems, surgery or biopsies, while the Working Group concentrated on museum and ‘archival’ collections of human remains acquired pre-1948.

202. Despite this and other differences in emphasis, the Working Group sees a close correlation between work and that of the ROC. The Working Group has responded to the DH's consultative document, *Human Bodies, Human Choices*, and has adopted its guiding principles as applying equally to human remains in museums.¹⁰¹ The Working Group sees particular parallels in the importance of valuing diversity within society; the primacy of consent and the need to respect the wishes, rights and well-being of genealogical and cultural descendants; and the responsibility of scientific interests to show that proposed research will cause no harm to relatives and descendants. The Working Group feels that there are strong resonances between the recent distress suffered by the relatives involved in the Alder Hey revelations and the distress of those indigenous peoples who are still mourning the loss of their ancestors taken from them decades ago. The Working Group feels that there is much merit in including museum collections of human remains within the regulatory structure proposed by the DH for health authorities and hospitals. Such a structure has the potential to bring about better standards of care and treatment of human remains nationally. The Working Group also believes there is value in introducing a system that is as far as possible consistent and equitable for claimants.

The Church Archaeology Group

203. The present Working Group's terms of reference encompass the legal status and treatment of all human remains in museum collections, and not merely those that emanate from outside England. Our Scoping Survey has confirmed that most human remains in English museums are in fact of UK origin: of 132 respondent institutions holding human remains, 106 acquired them through domestic archaeological activity. For the most part, the handling of these local or domestic remains throughout the cycle of acquisition,

¹⁰¹ See Chapter 7.

retention, research, loan and other treatment has been non-contentious, provoking no extensive public debate or acute general concern.

204. In 2002, the Council for the Care of Churches, the Cathedrals Fabric Commission and English Heritage sponsored a Church Archaeology and Human Remains Working Group. Its terms of reference¹⁰² include a consideration of the issues facing Church authorities and archaeologists arising from the discovery and excavation of human remains, and of the relevant legal, ethical and practical constraints. It is asked to recommend principles underlying the treatment of human remains in England with regard to burial, disturbance, excavation, reburial, research, retention and storage.

205. This new Church Archaeology Group is charged with taking account of the recommendations of the DCMS Working Group on Human Remains and is due to report in 2004. One of our members, Dr Maurice Davies, sits on the Working Group, to ensure that the proposals of the two groups are complementary. As the work of the Church Archaeology Group is necessarily focused on English remains, we have concentrated our efforts on non-UK human remains. We note, however, that the Church Archaeology Group's terms of reference take as their starting point the need to address both religious and scientific interests. We remain acutely aware that many ethical and practical questions are raised in respect of both UK and non-UK human remains, and we aim for parity of treatment within comparable cases.

102 Reproduced in full in Appendix 7.

Recent returns of artefacts (material other than human remains) from collections in UK museums

General

206. There is evidence that attitudes within the museum profession have changed substantially, if not universally, within the last two decades. Many UK museums have become more responsive to the concerns of users and other interested persons. Most museums have substantially tightened their policies to prevent the contemporary acquisition of illicitly-traded objects, and we understand that checks on provenance have become more stringent in consequence. Restitution and repatriation issues are extensively debated as topics relevant to many museums. The National Museum Directors' Conference has recently (2002) published *International Dimensions*,¹⁰³ which celebrates the international ethos of UK national museums and proclaims their adherence to such values as cross-pollination, the pursuit of common endeavours and adaptation to a 'rapidly changing globalised world'.

207. Of course, the making of public statements is one thing; the effective amelioration of practice is another. It is important to ensure that form does not eclipse substance, or that abstract declarations of principle do not become a substitute for concrete action. Professional exhortations to keep abreast of legal and other change might, for example, reward closer attention than they have hitherto received.

208. In other respects too our optimism is tempered by caution. For all the advances described in this chapter, the cooperative engagement of UK museums with indigenous peoples and other communities is still perceived in some quarters as falling short of that achieved by museums in North America and Australia.¹⁰⁴ To an extent it is natural that the voices of indigenous peoples should have more immediate impact within their

103 Available at: http://www.nationalmuseums.org.uk/news/int_dimensions.html

104 See, for example, the letter by Dr Michael Pickering, repatriation programme director at the National Museum of Australia in Canberra, in *The Age* (Melbourne) 24 May 2003, which suggested that the statements of scientists who opposed the return of indigenous remains reflected outdated rhetoric, unsupported by further evidence.

homeland than overseas, but against that must be placed the UK Government's own commitment to the recognition of cultural diversity. Our proposals are designed in part to redress such discrepancy.

Artefacts returned

209. The last few decades have seen numerous voluntary returns by UK museums of culturally significant items to claimant groups. For example, the 'Admiral Hipper' ship's bell was returned to Germany by the National Maritime Museum in 1982, and installed on a memorial to those who died on the vessel. Truganini's necklace and bracelet were returned by the Royal Albert Memorial Museum at Exeter to Tasmania in 1997.¹⁰⁵ In Scotland, the return of the Lakota Ghost Dance Shirt in 1999 was acclaimed as a model of the manner in which repatriation claims may be responsibly approached. In the words of the Select Committee on Culture, Media and Sport (Select Committee) in 2000: 'We commend the procedures adopted by Glasgow City Council for handling claims for return of cultural property, which provide an important model which others should examine and may wish to follow.'¹⁰⁶

210. In July 2003, the Marischal Museum at the University of Aberdeen announced its decision to return a horned head-dress with an eagle-feather trailer to the Blood Tribe in Canada. The Senior Curator of the Museum, Dr Neil Curtis, said: 'Unlike many repatriation requests, this has been marked by understanding and friendship on both sides and has had a very positive outcome for us all. The museum has learnt much more about the head-dress and traditional life on the Plains. I hope that the museum's care of the head-dress has contributed to the strengthening of Blood cultural traditions and that its return will be the beginning of new links between Aberdeen and one of the First Nations of Canada.'¹⁰⁷

¹⁰⁵ See Simpson *op. cit.*

¹⁰⁶ House of Commons Select Committee on Culture, Media and Sport, *Cultural Property: Return and Illicit Trade*, Seventh Report (2000) para 136.

¹⁰⁷ News Release from the University of Aberdeen, 7 July 2003.

211. A hand-over ceremony took place at the museum and ownership was transferred to the Blood Tribe's Mookaakin Cultural and Heritage Foundation. The head-dress was then to be taken to Canada. It was agreed that no replica would be made and no photographs of the head-dress would be published because of the concern by the Blood Tribe that multiple copies of sacred items are dangerous and offensive to themselves and to the Creator.¹⁰⁸

212. None of these returns required the enactment of enabling legislation and all were undertaken voluntarily. All of them testify to the willingness of many UK museums to respond positively to persuasive requests and to the liberty of such museums to make independent decisions based on the substantive issues. But the United Kingdom has shown its willingness to legislate in at least one appropriate case. That case involves a copy of the Australian Constitution, relinquished by the United Kingdom Public Record Office to Australia in 1990, where relocation was achieved by specific primary legislation. Section 1 of the Australian Constitution (Public Record Copy) Act 1990 (one of the shortest statutes on record) provides that: 'The copy of the Commonwealth of Australia Constitution Act 1900 which at the passing of this Act is on loan to the Commonwealth of Australia shall cease to be included in the public records to which the Public Records Act 1958 applies.'¹⁰⁹

213. This enactment bears a close similarity in technique to the French Loi on the return of the remains of Saartjie Baartman, discussed later in this chapter.¹¹⁰

108 Ibid.

109 The Chairman of the Working Group has been advised that this deletion from the records in question did not depend on the formal consent of the relinquishing institution (private information, 2002). In that respect, the case appears to resemble the return of the Stone of Destiny to Edinburgh Castle in 1996. It should further be noted that the preamble to the 1990 Act recites that 'the government of the Commonwealth of Australia has requested that the record copy of the Commonwealth of Australia Constitution Act 1900 which is at present on loan to the Commonwealth *should remain permanently in the keeping* of the Commonwealth' and that 'the government of the United Kingdom is willing to advise Her Majesty to accede to that request subject to the approval of Parliament of legislation releasing the copy from the provisions of the Public Records Act 1958' (emphasis added).

110 Para 217.

Material spoliated during the period 1933-1945

214. **General.** Parallels may also be drawn with the ways in which museums in the UK are responding to claims for objects whose owners lost possession of them during the period 1933-1945. Various international declarations (Washington in 1998,¹¹¹ Strasbourg in 1999¹¹² and Vilnius in 2000¹¹³) have endeavoured to prescribe standards for the treatment of such objects. Some countries (Lithuania, Czech Republic)¹¹⁴ have enacted imperative legislation compelling museums to return certain spoliated objects to their original owners. Other countries have hitherto favoured a discretionary approach, underpinned by measures designed to show a positive commitment to the resolution of claims. The United Kingdom is one such country. The House of Commons Select Committee considered in its Seventh Report the competing demands of public benefit over private restitution of spoliated objects and held unequivocally that the vindication of private property and the reversal of wrongs should prevail over the attractions of continued public access.¹¹⁵ The UK Government has been active in devising solutions to claims, founding the Spoliation Advisory Panel in 2000.

215. **The comparison pursued.** We consider later in this Report arguments that the policy of the UK Government towards questions of spoliated cultural objects affords a

111 *The Washington Conference Principles on Nazi-Confiscated Art* (1998).

112 Council of Europe, Parliamentary Assembly Resolution 1205: *Looted Jewish Cultural Property* (1999).

113 The Vilnius International Forum on Holocaust-Era Looted Cultural Assets, *The Vilnius Declaration* (2000).

114 The Lithuanian statute is Act No. I-1179 of 23 January 1996. The Czech statute is the Czech Republic Act of Mitigation of Certain Property Wrongs Caused by the Holocaust (adopted 21 July 2000). See generally Norman Palmer, *Museums and the Holocaust* (2000) Leicester: Institute of Art and Law, Chapter 10 'Current national initiatives'; 'Memory and morality: Museum policy and cultural assets' *Art Antiquity and Law* 6(2001) p 259 (lecture delivered at the National Gallery of Australia, Canberra, July 2001).

115 House of Commons Select Committee, op. cit. para 193: 'While there are merits to a solution which secures continuing public access to an object in a museum, that interest must be seen as subordinate to the interests and wishes of a rightful owner.'

constructive model for the resolution of claims relating to human remains.¹¹⁶

Other museum initiatives

216. Some English collections of material acquired from overseas in colonial times are, in their own words, ‘engaging in positive relationships with overseas source communities, seeking to alter colonial dynamics of representation’. In some cases the result is the re-identification, in new displays and interpretations, of objects that were previously poorly documented. The Pitt Rivers Museum at Oxford is working with the Kainai Nation, Alberta, in a collaborative programme to document historical photographs.¹¹⁷ The Manchester Museum is working with representatives of local communities that have strong cultural ties to communities of origin in examining African items within its ethnographic collections, thereby gaining valuable information about the cultural significance and role of such items.¹¹⁸

116 Paras 289, 366. These arguments must be distinguished from those wider claims which analyse aspects of the recent history of Australian and Tasmanian Aborigines and other peoples in terms of genocide. This issue is the subject of vigorous debate in Australia: see, for example, Henry Reynolds, *An Indelible Stain* (2001) London: Viking Chapter 2; Bain Attwood and S. G. Foster, eds., *Frontier Conflict: The Australian Experience* (2003) National Museum of Australia, passim. We have respectfully concluded that our Report is not the place in which to further this debate, although we note the conclusion of the Report of the Human Rights and Equal Opportunity Commission inquiry *Bringing them Home* (1997) that the former policy of ‘forcible removal of children from indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture could properly be labelled ‘genocidal’ in breach of binding international law from at least 11 December 1946; cf Chapter 4, paras 129-130. At least one museum official in Australia (Vinod Daniel of the South Australian Museum) has been quoted as seeing a parallel between a family’s power to make decisions about its living members and the principles which should govern the release to indigenous peoples of sacred or cultural objects from museum collections: ‘The argument which is getting more heated internationally is: “Who can keep it better, we or you?” ... It’s similar to the stolen generation: “I can bring up your child better than you.”’ In declining to be drawn into the general debate we do not in any sense seek to diminish the suffering inflicted on Australian and Tasmanian Aborigines, or indeed on other indigenous peoples. We accept that past injustices are a strong factor in the current sense of loss, and highly material to the question of consent (as to which, see Chapter 7). For further discussion of possible parallels between the experiences of Jewish people during the Nazi era and those of indigenous people in Australia, see the late Ron Castan AM, QC, *Land Memory and Reconciliation* (1998), keynote address delivered at a Forum on Land, Memory and Reconciliation organised by the Koori Research Centre and the Australian Centre for Jewish Civilisation at Monash University, Victoria, Australia.

117 Laura Peers, ‘Sharing knowledge’ in *Museums Journal*, May 2002 pp 25-27.

118 Information supplied by Tristram Besterman, Director, The Manchester Museum.

Overseas national initiatives regarding human remains

France

217. In March 2002, legislation in France commanded the release of the remains of Saartjie Baartman from the National Museum of Natural History and their return to South Africa.¹¹⁹ The enactment is a rare (and possibly unique) example of a cross-border return mandated by statute. It concerns a single and identified individual who was alive when she left her land of origin and who died in poverty and degradation overseas.¹²⁰ The return destination is a political unit which did not exist at the time of removal.¹²¹

Spain

218. In 2000, the Darder Museum of Natural History at Banyoles in Catalonia returned to Botswana the skull and other bones of a deceased man who had become known as 'El Negro'. The remains had been bequeathed to the town by a collector named Darder and held in the museum from the date of the bequest in 1916 until their return.¹²² Demands for the return of the body had been made from 1991 by Alphonse Arcelin, a medical doctor practising in Cambrils, and more recently by officials and journalists in the African continent. Staff at the museum and the City Council at Banyoles originally opposed the

119 'Loi 2002-323 06 mars 2002 – Loi relative à la restitution par la France de la dépouille mortelle de Saartjie Baartman à l'Afrique du Sud. En vigueur depuis le 07 mars 2002. A compter de la date d'entrée en vigueur de la présente loi, les restes de la dépouille mortelle de la personne connue sous le nom de Saartjie Baartman cessent de faire partie des collections de l'établissement public du Muséum national d'histoire naturelle. L'autorité administrative dispose, à compter de la même date, d'un délai de deux mois pour les remettre à la République d'Afrique du Sud.' (Act relating to the restitution by France of the remains of Saartjie Baartman to South Africa. This Act will enter into force on 7 March 2002.)

As from the date of entry into force of this Act, the surviving remains of the person known as Saartjie Baartman will cease to form part of the public collections of the National Museum of Natural History. The administrative authority has a time limit of two months, starting from the date of entry into force, within which to deliver the remains to the Republic of South Africa.)

120 See reports in *The New York Times* 30 January 2002 (Suzanne Daley) and 4 May 2002 (Rachel L Swarns).

121 Cf. the continuing claim against the Musée de l'Homme in Paris for the return to Uruguay of the remains of Vaimaca Piru: see Rodolfo Martinez Barbosa, 'One hundred and six years of exile: Vaimaca Piru and the campaign to repatriate his remains to Uruguay', in Fforde et al., op. cit. Chapter 16.

122 This case is documented in N. Parsons and A.K. Segobye, 'Missing persons and stolen bodies: The repatriation of 'El Negro' to Botswana', in Fforde et al., op. cit.

demands, but finally acceded in June 2000 (some 160 to 170 years after the original disinterment and removal) in response to pressure from the Spanish government and the Organisation of African Unity.¹²³ Widespread dissatisfaction was expressed in the country of return at the manner of return and the condition of the remains on return.¹²⁴

Israel

219. Under the Israeli Antiquities Law 1978, ancient osteological remains uncovered in excavations are defined as antiquities. Burial sites are excavated only by the Israeli Antiquity Authority and it was common practice for any remains excavated to be moved to another site for reburial under Jewish religious law. A legal challenge to this practice was mounted in 1992 by a strict orthodox group called Atra-Kaddisha, who opposed the excavation of any burial grounds, on the basis that they might contain Jewish remains, as well as the scientific study of bones or any action which might disturb the peaceful rest of the dead. Although the court confirmed that ancient graves could be excavated in the course of a licensed archaeological dig, the Attorney-General subsequently issued guidelines in 1994 advising that, whilst this was the case, human skeletons were no longer to be regarded as antiquities. Bones are now to be transferred as soon as possible to the Ministry of Religious Affairs for reburial, with the transfer taking place, if possible, at the place of excavation. This has meant that any examination of bones must now take place on site and laboratory analysis of human remains in Israel has therefore become virtually impossible.

Ireland

220. **The 2000 Report.** At the request of the National Museum of Ireland, the Irish Heritage Council commissioned a study on all aspects of human remains in Irish

123 See Rachel L Swarns, 'After century on display, an African "goes home"', in *International Herald Tribune*, October 7-8 2000, where it is reported that the corpse had been disinterred by two brothers named Verrieaux soon after its burial in the grave near the confluence of the Orange and Vaal rivers, in what is now northern South Africa. Cf. the claim for the return to Uruguay of the remains of Vaimaca Piru: Martinez Barbosa op. cit.

124 Parsons and Segoby in Fforde et al., op. cit. pp 250-251.

archaeology in March 1999. The study, which covered the period 1989–1998, was wide-ranging and consultative, taking full account of the law, planning and archaeological issues, and public feeling. The first full draft of the committee’s report was published in March 2000, and the results and recommendations of the report are likely to underpin policy recommendations drafted in the future. The report makes no reference to any non-Irish remains in national collections, and the question of restitution to specific individuals or groups is not considered at all. The scientific and historical aspects of human remains receive greater prominence than ethical considerations relating to retention and return.

221. **Exhumation and reburial in law.** Statutory protection may be afforded to national and historic monuments and archaeological areas, including graves or burial grounds, under the National Monuments Acts 1930–94. The Acts supersede the Common Law position that there is no property in a corpse and explicitly define ancient or historical human remains as archaeological objects. Under the Acts, it is illegal to exhume ancient or historical human remains without an excavation licence and it is an offence to rebury such remains without the express consent of the National Museum. The current policy of the National Museum is to retain all excavated human remains amounting to scientific material. Nonetheless, the Director of the Museum has discretionary power to dispose of such remains, including reburial. The recently published *Framework and Principles for the Protection of the Archaeological Heritage* (DAGHI 1999) recognises the limited facilities available for the storage of human remains and advocates a policy of preservation in situ. It was envisaged that enforcement would be promoted by a national licensing authority, but unfortunately adequate resourcing has proved to be a problem.

222. **Special consideration for human remains?** The Irish approach to human remains tends to preservation as opposed to return. The study indicated that osteoarchaeologists and county/ municipal museum curators throughout the country

supported a policy of analysis followed by permanent curation. The report made clear that 'the National Museum is proud of its existing collection of human remains', which is made available to researchers of archaeology and medical history. Most of the professionals consulted had no objection to the enlargement of the collection by the retention of all archeologically excavated human remains. The study confirmed that the archaeologists' views were very widely supported by the Irish public. Almost nobody who responded to the survey objected to the excavation and analysis of human remains on grounds of decency or religious belief, and all respondents thought that the scientific results of this kind of investigation were of general interest and public benefit. Nonetheless, there was one very significant issue on which public and professional opinion divided. Most members of the public felt that curation in a museum was not the proper way to dispose of excavated human remains once analysis and reporting were completed, favouring reburial with an appropriate ceremony instead. However, the committee felt that from a scientific viewpoint it would be unethical to dispose of valuable scientific material by reburying it, denying posterity the chance for further research. As a compromise, it suggested the 'creation of local repositories, effectively burial vaults, where the remains would be stored in a secure, ordered and accessible fashion'. Although the committee recommended the permanent curation of excavated human remains over reburial, it proposed that the choice should be made on a case-by-case basis, and after due consultation with local communities. The committee concluded that 'a sea change in attitude, practice and policy is needed' in respect of the archaeology of human remains and recommended a wide range of measures to bring this into being, including planning procedures, public consultations, site identification and testing. Moreover it felt that 'these measures are wholly justified by the special consideration due to human remains, by the unusual degree of public interest and strong feelings likely to be aroused by the excavation and subsequent disposal of human remains, and by the unusually high costs and delays to development which may often arise from cemetery excavations.'

United States of America

General

223. The Working Group has looked closely at the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990, and at its effects in practice.¹²⁵ This American federal legislation compels all federally funded museums to make inventories of Native American human remains, associated funerary objects, and certain other important cultural artefacts in their collections; to notify Native American tribes of such holdings and to consult with tribal members about such material; and to repatriate to lineal or cultural descendants (where these are federally recognised Indian tribes) such items when requested.¹²⁶

Experience and Impact

224. There are grounds for concluding that the most obvious lessons to take from NAGPRA are:

- the importance of offering knowledge and financial support to institutions attempting to implement such legislation;
- the importance of anticipating potential sources of difficulty and resolving these in legislative texts, and of providing adequate legislative guidance in interpretation of the law;
- the importance of having mechanisms to resolve conflicts, such as the NAGPRA Review Committee, which examines individual cases in the light of the law and makes recommendations for resolution;¹²⁷

¹²⁵ Native American and Graves Protection and Repatriation Act (NAGPRA), Public Law 101-601 – 16 November 1990.

¹²⁶ For a more detailed account of the provisions of NAGPRA, see Appendix 10.

¹²⁷ McManamon, *op. cit.*, note 000 at p 141.

- the fact that with regard to the federal court jurisdiction, in practice, dispute resolution has not been heavily utilised. In many cases, consultation and negotiation have been prevalent as methods of reaching solutions;¹²⁸
- the fact that the role of the Review Committee has been more of ‘a forum, catalyst, and monitor of NAGPRA implementation’;¹²⁹
- the fact that NAGPRA can strengthen working relationships with local tribes;¹³⁰ and
- the fact that consultation between such parties can actually lead to institutions being able to identify previously unidentified objects.¹³¹

225. Despite the difficulties involved, it is our impression that much of the impact of NAGPRA has been positive. The legacy of NAGPRA has moved the museum profession and linked research bodies significantly towards new attitudes, policies and procedures that acknowledge Native rights in human remains and heritage materials, and involve Native people in institutional and professional policy-making. There has been debate and controversy, but these have ultimately been very healthy for the museum profession and associated scientific research bodies.

Canada

226. Although Canada has no national legislation regarding historic and prehistoric human remains, the broad policy of the Canadian Museums Association with regard to the return of objects from museum collections declares a clear commitment to the timely, respectful and positive treatment of demonstrable claims. We believe that this is sufficiently important to be set out verbatim.

128 James Nafziger and Rebecca Dobkins, ‘The Native American Graves Protection and Repatriation Act in its first decade’, in *International Journal of Cultural Property* 8(1999) 77. A summary of this article is found at Appendix 4.

129 Ibid.

130 Ibid.

131 Ibid.

E. 4.4 Domestic and Foreign Returns

227. Every request for restitution, repatriation or return must be given immediate and serious consideration, and treated with respect and sensitivity. Such requests can only be resolved by each museum on a case-by-case basis. Museum policies must clearly describe the process followed to answer such requests.

In the event of requests from a foreign state, museums should facilitate negotiations, rather than awaiting action at a government or political level.

Objects which are specifically held 'in trust' for any community may be returned to that entity or to another appropriate institution that is mutually agreeable.

Museums should be committed to the return of human remains, directly associated funerary objects and culturally sensitive objects, when requested by communities or groups with a demonstrable claim of historical relationship to them, and be prepared to facilitate the return of material which may have been acquired under circumstances that invalidate the museum's claim to title.¹³²

228. This guidance is, however, subject to existing legal restraints. So much is recognised by paragraph E. 4.1, which includes the provisions that the museum must ensure that:

- a) it is legally free to act;
- b) it has clear title to the objects proposed for disposal and/or in the case of undocumented material, that it has made a serious, diligent and documented effort to locate owners;

¹³² *Canadian Museums Association Ethical Guidelines 1999*, available at www.museums.ca. See also Canada Parks Management Directives 2.3.1., *Human remains, Cemeteries and Burial Grounds* (June 2000), and 2.3.4. *Repatriation of Moveable Cultural Resources of Aboriginal Affiliation* (June 2000).

- c) there are no restrictions associated with the material when it was acquired;
- d) the transaction is fully approved by the governing authority;
- e) objects for which a request for return, restitution or repatriation could reasonably be expected to arise in the future are not to be considered for disposal by other means.¹³³

229. Provincial museum associations¹³⁴ and major provincial museums¹³⁵ in Canada have similar policies.

Australia

230. Australia has developed laws that require newly disinterred indigenous human remains to be delivered to the indigenous people traditionally associated with the land on which the remains were found.

Australian federal legislation

231. The principal Australian federal legislation is the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. The Act does not compel the return of human remains from museums or other institutions. Instead, it extends protection to objects of

¹³³ *Canadian Museums Association Ethical Guidelines 1999.*

¹³⁴ See, for instance, Museums Association of Saskatchewan, *Standards for the Care of First Nations and Metis Collection* (2001). This policy states a general obligation of care in respect of First Nations cultural and historical material; it is not peculiar to human remains.

¹³⁵ See, for example, the *Policy of the Board of the Royal Museum of Ontario (ROM) on the Repatriation of Human Remains of the Aboriginal Peoples of Canada*. By this policy, ROM commits itself to 'treating the human remains of the Aboriginal Peoples of Canada presently in its possession with dignity and respect and to returning them to the descendant Aboriginal communities upon request and in the appropriate manner'. The object of this policy is stated to be 'to facilitate the return of human remains to descendant Aboriginal communities if this is the expressed wish of these communities and they have a demonstrable claim'. The policy continues: 'All requests for the return of human remains by an Aboriginal community that can demonstrate ancestry will be reviewed on a case-by-case basis. If no conclusive evidence of ancestry can be provided, claims based on cultural affinity will also be considered. The ROM will make every reasonable effort to respect the wishes of the descendant Aboriginal communities requesting the return of human remains. Requests from Aboriginal groups not resident in Canada will be considered on a case-by-case basis.' The expression 'cultural affinity' is defined as referring to 'a relationship of shared group identity which can be reasonably traced historically or prehistorically between a present day Aboriginal community and an identifiable earlier group.'

particular significance to Aborigines, according to Aboriginal tradition,¹³⁶ from any threat of injury or destruction. Human remains fall within the ambit of the Act. However, the statutory protection is contingent upon the appropriate minister issuing a Declaration that he is satisfied that the objects are under such threat.¹³⁷

232. Individuals who discover anything that they have reasonable grounds to suspect of being Aboriginal remains must report that discovery to the minister¹³⁸ who, if satisfied that the remains are Aboriginal (as defined in section 3(1)), must take ‘reasonable steps to consult with any Aborigines that he or she considers may have an interest in the remains, with a view to determining the proper action to be taken in relation to the remains’.¹³⁹

233. The Act imposes a positive duty on the minister (whether or not in pursuance of a Declaration) to return the remains to any Aborigine or Aborigines entitled to, and willing to accept, possession, custody or control of the remains in accordance with the Aboriginal tradition, or alternatively to deal with the remains in accordance with their reasonable directions. If there are no such Aborigines, the minister is required to transfer the remains to a prescribed authority for safe-keeping.¹⁴⁰

234. The Act does not provide any specific guidance in relation to the mechanism by which remains are returned, or as to their treatment, other than the requirement that they should be treated ‘in accordance with any reasonable directions of the Aboriginal community’. Furthermore, the Act specifically recognises the right of any Aborigines accepting possession, custody or control of any remains to deal with them in accordance with Aboriginal tradition.¹⁴¹

136 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHPA), s 3(1).

137 ATSIHPA, s 12. A declaration made under this section may include provisions ordering delivery, either to the Minister, or to one or more Aborigines who are ‘willing to accept possession, custody or control of the remains in accordance with Aboriginal tradition’.

138 ATSIHPA, s 20(1).

139 ATSIHPA, s 20(2).

140 ATSIHPA, s 21(1). Equivalent provisions apply to Victoria under Part II of the Act.

141 ATSIHPA, s 21(2).

Tasmanian legislation

235. In contrast to the position elsewhere in Australia, the state of Tasmania has its own legislation which does require the return of indigenous human remains. The Museums (Aboriginal Remains) Act 1984 (Tas) applies to the collections of the Tasmanian Museum and Art Gallery and to the Queen Victoria Museum and Art Gallery.

236. Any remains of the original inhabitants of Tasmania, or their descendants, in the possession of either museum become the property of the Crown on the commencement date of the Act.¹⁴² As soon as was practicable after the vesting of the property in the Crown, the minister was required to serve notice on the relevant trustees (in the case of the Tasmanian Museum), or corporation (in the case of the Queen Victoria Museum) for the delivery of the remains to such elders of the Tasmanian Aboriginal community as the minister directed. It was provided that property in the remains then vested in the elders as trustees for the Tasmanian Aboriginal community. Thereafter, the Act required the museums to deliver the remains to the appropriate Tasmanian Aboriginal community elders, in whom title to the remains is vested on behalf of their community.

237. The Act further provides that where an elder dies or becomes incapable of acting as trustee, the minister may (on the recommendations of representatives of the Tasmanian Aboriginal community) appoint another elder to act as trustee of the remains in his place.¹⁴³

Museum policy on return of human remains

238. Outside Tasmania, there is no general legislative requirement in Australia for museums to deliver up human remains (or other culturally significant material) that entered collections before the current legislation was enacted. Nonetheless, most

¹⁴² Museums (Aboriginal Remains) Act 1984 (Tas), s 4(1) (Tasmanian Museum and Art Gallery) and s 6(1) (Queen Victoria Museum and Art Gallery).

¹⁴³ Museums (Aboriginal Remains) Act 1984 (Tas), s 9.

museums in Australia do have policies that mandate the return of remains and artefacts,¹⁴⁴ which in some instances occurs with government involvement. According to at least two observers, Australian museums have ‘generally acted to forestall the introduction in Australia of legislation similar to NAGPRA’.¹⁴⁵

239. General policy within Australia is reflected in *Previous Possessions, New Obligations* (Museums Australia 1993, reissued 1999). This document has become the reference-point for the development of institutional policies that give rights of custodianship to indigenous communities, and encourage the return of material to those who want it.¹⁴⁶ The document does not direct that Australian museums return human remains, although a fully informed and ‘meaningful’ consultation with indigenous communities regarding human remains is required. The preamble to paragraph 1 states that: ‘It is the clear intention of this policy that museums must enter into meaningful consultation with indigenous communities regarding human remains. Any decision over the return of human remains (even when museums are holding them on behalf of communities) must be made after conducting culturally sensitive consultation.’

240. In order for a museum to retain indigenous human remains for research, it must first satisfy indigenous people that such research is of value. Consultation must precede both the conduct of any research and any decisions on return. The fruits of all research permitted by indigenous communities must be shared with them. The document states: Museums recognise the potential value that human remains may have in understanding people’s health and way of life in the past. However, before a museum can keep any human remains based on their research value the museum must first prove its claims to the satisfaction of the relevant Aboriginal and Torres Strait Islander people.¹⁴⁷

144 For a discussion of the policy statements of the National Museum of Australia (NMA) and the Museum Victoria, see Chapter 4.

145 Jim Specht and Carolyn MacLulich, ‘Changes and challenges; The Australian Museum and indigenous communities’ in Paulette M McManus, ed., *Archaeological Displays and the Public* (2nd edn, 2000) p 47. Jim Specht and Carolyn MacLulich are Heads of the Divisions of Anthropology and Education at the Australian Museum.

146 The Working Group recognises that the Australian document was produced in the context of a general public commitment to self-determination among indigenous peoples. The Working Group does not feel, however, that this aspect deprives the Australian document of its value as a guide or model outside Australia.

147 Museums Australia, *Previous Possessions, New Obligations* (1999). p 2 para 1.10.

Guidance on custodianship and return

241. Australia also has domestic machinery for the temporary custodianship and, where appropriate, ultimate distribution of human remains released from museums.¹⁴⁸ It has also produced guidance for UK institutions on the preferred procedures to be followed when providing information on their collections of Australian Aboriginal and Torres Strait Islander human remains. The *Guidelines for the Sharing of Information between British and Australian Institutions and Aboriginal and Torres Strait Islander People*, published by ATSIC in 2002, offer practical suggestions as to the authentication of requests, the delivery of information in a manner that avoids improper disclosure, and the handling of Australian Aboriginal and Torres Strait Islander human remains while in the care of UK institutions. As regards the last of these matters, the following are set out as the ‘correct protocols’:

- consult with the relevant Aboriginal and Torres Strait Islander party before any intended viewing, handling, movement or repackaging;
- treat the remains with care and respect, in recognition of their significance to traditional custodians;
- keep in secure storage and in a conditioned environment that meets internationally recognised standards for the storage and curation of human remains (with adequate exposure to light, temperature, moisture, ventilation and chemicals);
- do not display the remains;
- do not handle unnecessarily; (if handled for the purpose of documenting; provenancing and repatriation of the remains, this ought to be done in a considerate manner);

¹⁴⁸ See footnote 164 below.

- do not subject to educational activities or scientific research.

Other matters

242. Two further developments in Australia are worth noting. The first is the high level of repatriation of artefacts from Australian museums to overseas countries including New Zealand, the Solomon Islands, Papua New Guinea, Vanuatu and other destinations.¹⁴⁹ The second is the high level of community involvement in museum space, exhibitions and performances. The desire of Aboriginal people to record and celebrate aspects of their culture and beliefs has played a leading part in this involvement.¹⁵⁰

New Zealand

243. New Zealand has no national legislative framework for either the treatment or the return of human remains. Instead, the indigenous rights which are enshrined in the Treaty of Waitangi are said to be given recognition by individual museums.¹⁵¹

244. Policies in New Zealand make similar provision to that in the Australian policy document *Previous Possessions, New Obligations*, with the development of bicultural governance arrangements for museums and the consequent responsibility of Maori within the museums for indigenous human remains. These policies are implemented by

149 Specht and MacLulich, *op. cit.*, pp 49-50.

150 '[M]any Aboriginal people have expressed the wish to record and make known to both Aboriginal and non-Aboriginal people aspects of the history, traditions and contemporary culture of Aboriginal society. This wish has been reflected in the establishment of many small local museums and cultural centres ... The Commission recommends that Government and appropriate heritage authorities negotiate with Aboriginal communities and organisations in order to support such Aboriginal initiatives.' *Report of the Royal Commission Inquiring into Aboriginal Deaths in Custody* (1991) Recommendation 56; cited by Specht and MacLulich, *op. cit.* p 53.

151 See M. Kawharu, 'Indigenous governance in museums: A case study, the Auckland War Memorial Museum' and P. Tapsell, 'Partnership in museums: A tribal Maori response to repatriation', in Fforde et al., *op. cit.*, note 9. More information is found on the website of the New Zealand Government. Particular mention is made of the Auckland War Memorial Museum and the Te Papa Tongarewa Museum in Wellington.

individual museums and there is no single national policy in relation to human remains.¹⁵²

245. The Museum of New Zealand, Te Papa Tongarewa (Te Papa), has a sacred keeping-place where sacred material and human remains can be kept. This area is blessed by the *tohunga* (Maori priest) and is not open to the public. Access is permitted for cultural purposes or for *bona fide* research. In 1998 a number of *mokomokai* were returned from the physical anthropology museum at Edinburgh University to New Zealand and were placed in the sacred repository. Such a policy, whilst appropriate for certain cultural groups, would not be acceptable to those groups for whom reburial is the only solution.¹⁵³

246. We have seen that, in its submission to the Working Group, Te Papa provided a summary of its attitudes and procedures regarding human remains within its collection.¹⁵⁴

The following points emerge from its formal document:

- Te Papa does not recognise human remains as artefacts or collection items.
- Te Papa recognises that these human remains embody *matuaranga* Maori (Maori traditional knowledge/perspectives) which are held by Maori, and belongs only to Maori.
- Te Papa actively seeks to repatriate human remains.

¹⁵² The governance policy of the Auckland War Memorial Museum, policy on human remains dated 6 May 2002, states that the purpose of the policy is 'to ensure that the Maori values associated with any *whakapakoko*, *uru moko* or *koiwi* (Indigenous Human Remains) in the possession of the Museum are protected until such time as they can be repatriated to source.' and 'to facilitate the repatriation of all Museum-associated Indigenous Human Remains back to source'. Remains are held in the Museum Urupa (cemetery) with access limited to culturally and professionally appropriate persons and agreed by the museum's Maori board or Taumata-a-Iwi. This policy is available at www.governance.akmuseum.org/nz as of 18 August 2003. The governance policy of the Museum of New Zealand/Te Papa Tongarewa states that: 'Domestic repatriation (in respect of *koiwi tangata* [human remains]), where undertaken, is in accordance with policy guidelines which establish the procedure for approving and undertaking repatriation requests.' This policy statement is available at www.tepapa.govt.nz/ as of 18 August 2003. Further discussion of bicultural governance policies and strategies in New Zealand may be found in Kawharu in Fforde et al., *op. cit.*

¹⁵³ For a discussion of the museum's policies see Chapter 4.

¹⁵⁴ Para 138 et seq.

- Te Papa does not knowingly display human remains.
- Where provenance can be identified, Te Papa recognises the interests of indigenous peoples in their ancestral remains.

In addition, the following principles and practices might be mentioned:

- Te Papa supports the repatriation of ancestral remains of clear and known New Zealand provenance, to New Zealand.
- Te Papa encourages dialogue between requesting communities and museums in regard of the care, management and return of ancestral remains.
- Te Papa encourages inter-governmental agreements to facilitate the return of ancestral remains.

247. However, it is worth noting that during their oral submissions the Mokomokai Education Trust complained that, whilst Te Papa may profess to recognise the interests of indigenous peoples in their ancestral remains, they felt that the human remains with Te Papa are as inaccessible to them now as they were when they were in European museums.

248. Te Papa has just received a considerable educational grant from the New Zealand Government, which will allow it to implement a programme for the repatriation of Maori remains. Te Papa has said that, in this process, the physical and spiritual well-being and integrity of the ancestors whose remains it holds is a priority. In this context, Te Papa sees itself as a facilitator of repatriation; it is in the process of contacting institutions with whom it has already discussed this issue, and will contact institutions with whom it has never before had contact in early 2004. The hope is that repatriation can then be arranged by mutual agreement between Te Papa and the institutions concerned.

Judicial reference to Aboriginal and Maori beliefs

249. In recent years, Australian courts have increasingly acknowledged the importance of considering Aboriginal customary and religious beliefs when determining the appropriate treatment of the dead. Such recognition has occurred in relation to both the conduct of post-mortem examinations and the appropriate place for burial.

250. In *Re the Death of Unchango (Jnr); ex parte Unchango (Snr)*¹⁵⁵ the question for the judge was whether he should use his discretion to disallow an autopsy of an infant who had died suddenly. There was little doubt that the death was by natural causes, although the *exact* cause had not been established. The judge concluded that an autopsy would be inappropriate in the circumstance, given the presence of strong cultural beliefs of the family and community. He did, however, include the caveat that this authority should be restricted to its facts and should not be seen as a general precedent for the future. The decision appears to be indicative of an emerging recognition of religious and customary beliefs.

251. An example of a determination by the court in favour of an autopsy, contrary to the wishes of the relevant Aboriginal community, is the case of *Wuridjal v The Northern Territory Coroner*.¹⁵⁶ Here, the court was of the view that, although it had a discretion whether or not to order that no autopsy be performed, the circumstances of the girl's death suggested suicide by hanging. Riley J weighed the competing interests, but felt that, because of the high level of suspicion in this case, it was necessary to determine precisely her cause of death, and that this imperative outweighed the interests of her family to preserve her body intact.

¹⁵⁵ Supreme Court of Western Australia in Chambers, 19 August 1997.

¹⁵⁶ [2001] NTSC 99.

252. In another decision a court in Australia felt compelled, by proper respect and decency, to consider the ‘spiritual or cultural values’ of the parties to a dispute over the place of burial of an Aboriginal man.¹⁵⁷

253. Case law from New Zealand indicates that the right to bury a deceased person may be invoked by descendants or tribal groups long after the death.¹⁵⁸ The grant of letters of administration by a court in New Zealand contributed to the successful opposition by a Maori group to the auction at Bonhams of the tattooed head of a Tupuna warrior in 1988.¹⁵⁹ The head was eventually withdrawn from sale. In theory such rights might be used to obtain possession from a museum. The matter was eventually settled and was not tested before any English court.

254. There appears to have been only one occasion on which similar questions arose before an English court.¹⁶⁰ The deceased, a young man of Aboriginal origin, had recently died in England, leaving no will. His daughter, a minor born and living in England, was the only person entitled to succeed his estate.¹⁶¹ The natural mother of the dead man was an Aboriginal woman from Queensland who attached great importance to her cultural belief that her son should be buried at his birthplace. The dead man’s adoptive mother and the mother of his child (both of whom were English) had already made arrangements for his burial in England. An application was made by the birth mother under section 116 of the Supreme Court Act 1981, which is the legal provision invoked when a party seeks to displace the person who is normally under a duty, or has the right, to dispose of a body. The court’s power is dependent on the existence of ‘special circumstances’ and that it is ‘necessary or expedient’ to appoint an alternative administrator. Hale J held that

¹⁵⁷ *Jones v Dodd* [1999] SASC 125, Millhouse J.

¹⁵⁸ Cf. Paul Turnbull, ‘Indigenous Australian people, their defence of the dead and native title’ in Fforde et.al., op. cit. Chapter 5, especially at pp 72-75.

¹⁵⁹ Unreported decision. The case is noted by Professor Patrick O’Keefe, in *International Journal of Cultural Property* 2(1992) p 393. See also Appendix 4.

¹⁶⁰ *In the Estate of Dayne Kristian Childs, Buchanan v Milton*, 27 May 1999, (2000) 53 BMLR 176.

¹⁶¹ As she was a minor her mother (who was not married to the deceased) and the deceased’s adoptive mother applied to be co-administrators *state*. See also Appendix 4.

there were no special circumstances making it necessary or expedient to displace the person normally entitled to be granted administration of the estate. She considered the competing views of the birth family, the adoptive family, the dead man's daughter and the dead man himself. She concluded that his daughter (acting through her grandmother and mother as litigation friends) was the proper person to make arrangements for the disposal of his body.

255. Several recent academic papers published in England have addressed the issue of human remains retained by museums and other such institutions. In 2000, Tristan Shek¹⁶² charted the development of the 'no-property' rule relating to human remains and looked at the impact of the Human Rights Act 1998 on possible claims made by Aboriginal groups for the repatriation of human remains from United Kingdom museums. More recently still, Charlotte Woodhead¹⁶³ wrote about the wider considerations that should be addressed when determining repatriation requests. She concluded that many non-indigenous remains have been excluded from the debate on repatriation and that all remains should be afforded respect *as* remains. The debate should not be dominated by either legal or political considerations.

256. In a lecture given in October 2002,¹⁶⁴ Sir Anthony Mason (Chief Justice of Australia from 1987 to 1995) examined the ethical dilemmas faced by charities, particularly when disposing of cultural and historical material. He considered the position of human remains and suggested that the arguments for retention were by no means compelling. He opined that unless there was a realistic prospect of the remains being used for scientific research then there was no strong justification for failing to repatriate them.

162 Tristan Shek, 'Can dust remain dust? English law and indigenous human remains', in *Art Antiquity and Law* 5(2000) p 265. See Appendix 4 for a summary of this article.

163 Charlotte Woodhead, 'A debate which crosses all borders – The repatriation of human remains: More than just a legal question', in *Art Antiquity and Law* 7(2002) p 17. See also Appendix 4.

164 The Hon. Sir Anthony Mason, AC, KBE, 'Ethical dilemmas for charities: Museums and the conscionable disposal of art', Lecture for the Institute for Philanthropy, University College, London, 1 October 2002, in *Art Antiquity and Law* 8(2002) p 1. See Appendix 4.

Other initiatives within Australia and New Zealand

257. Museums and indigenous communities have been supported in financial and policy terms by the joint Australian/New Zealand Return of Indigenous Cultural Property (RICP) Program, which is focused on the repatriation of artefacts and remains in Australian museums. The National Museum of Australia acts as a custodian for remains for which the relevant community cannot be immediately identified, a role which is sanctioned by the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.¹⁶⁵

Austria

258. One last international example may serve to illustrate the importance of parity of treatment. In 2002, it was reported that an Austrian hospital had been found to possess the remains of children who had died during the Nazi era.¹⁶⁶ The response was immediate and unqualified. Measures were introduced to identify victims and families, and the remains were returned. No-one could conceivably question this result. Nor is it imaginable that any medical authority would dare to retain the bodies of murdered children against the wishes of their families, on the grounds that science and society would benefit from research. Indigenous peoples might reasonably question whether a similar sensitivity and instinct for the morally decent response should not be extended to them.

¹⁶⁵ Section 21(1)(c) of the Act states: 'Where Aboriginal remains, other than remains discovered in Victoria, are delivered to the Minister, whether in pursuance of a declaration made under section 12 or otherwise, he or she shall: ... if there is or are no such Aboriginal or Aborigines [i.e. Aboriginal(s) entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal traditions, see s. 21(1)(a)] – transfer the remains to a prescribed authority for safekeeping'; see also section 21Q(1)(c) which contains a similar provision dealing specifically with human remains discovered in Victoria.

¹⁶⁶ Barbara Miller, 'Child remains from Nazi euthanasia clinic laid to rest', in *The Independent*, 25 April 2002, p 11 (see also <http://news.bbc.co.uk/2/hi/europe/1956494.stm>). The reference to the trial in 2000 of Dr Gross who obtained the samples at the Spiegelgrund clinic is: <http://www.time.com/time/europe/magazine/2000/0403/trial.html>. On remains found most recently at the clinic and reported 14 August 2003: http://www.news.com.au/common/story_page/0,4057,4214012%5E401,00.html

Summary

259. The return of human remains and other culturally significant material by museums and other entities has advanced substantially within the United Kingdom over the past decade. Greater candour, coupled with an enhanced willingness to consult and a stronger impulse to share knowledge and research, are producing beneficial partnerships between some museums and communities of origin.

260. Consistently with that, there appears to be a growing climate of understanding and sensitivity among museums, medical institutions and government. This involves a growing readiness to listen to argument and to question past attitudes. There appears to be an enhanced open-mindedness about the case for repatriation, albeit one tempered by the constitution of, and restrictions on, the respondent institution and the need for individual assessment of each case.

261. At the same time, the quality of communication and understanding among interested groups appears variable and open to improvement. Progress towards an informed and even-handed resolution of claims appears sporadic rather than sustained. The official response to claims can depend on distinctions (such as the legal identity and powers of the institution) that have no readily discernible basis in modern policy.

262. In these circumstances, we counsel against the temptation to assume that documents and protocols recording dignified sentiments and convictions are an adequate replacement for positive measures or concrete guidance to deal with real practical cases.

263. Even so, our prevailing impression is that much of the current climate is positive. Some of the foregoing examples show what governments and institutions can accomplish (for example, through the selective modification of laws and policies) when they see cause to intervene.

264. We believe that our survey illustrates some of the dangers of differential treatment, and the need to avoid arbitrary discrimination among different categories of claimant. If we are willing to return Truganini's hair, skin, necklace and bracelet, why not her friends and compatriots? If we are willing to surrender for burial in his homeland the remains of a Brazilian who fled to England to escape persecution, why not the remains of a Maori warrior whose head was brought to England as a curio? If we are willing to release to Australia its birth certificate, why not its children?¹⁶⁷

265. As we have seen, there is a potential loss of scientific information when human remains are returned. The potential loss of scientific information is, however, considered to be a material element only in some repatriation claims. It may be thought that to introduce scientific interests as a material element in some repatriation claims, while excluding them from other claims, is itself discriminatory.

266. Of course, each case is different and each must be considered on its own merits. The differences among cases may or may not be material to the morality of the particular case. To avoid arbitrary discrimination we believe that there should be procedural and remedial uniformity whatever the outcome of individual cases. Without it, the sense of injustice will be perpetuated and the opportunity for conciliation irrevocably lost.

¹⁶⁷ The question of a possible breach of Article 14 of the European Convention on Human Rights may also need to be considered in this context (see Appendix 3, paras 39-43).

Chapter 6: Contemporary law¹⁶⁸ in England and Wales

General

267. Two main issues arise from the current state of the law in England and Wales as it bears on human remains:

- i. the legal status of human remains as the property of museums or other interested parties; and
- ii. the legal restraints on the ability of museums to divest themselves of human remains.

We discuss these, and other subsidiary issues, below.

A prefatory note

268. Throughout the analysis which follows, it is to be understood that the British Museum does not commit itself to any particular interpretation of any of the provisions of its governing statute, the British Museum Act 1963, or of any other relevant enactment, such as the Charities Act 1993. The British Museum reserves the right and power to make its own judgements about the meaning of relevant provisions on a case-by-case basis. At the time of writing, the British Museum awaits the Attorney-General's determination as to whether, as a charity, it has the power to give effect to moral claims that its Trustees wish to recognise, subject to the Attorney-General's sanctioning the course that the Museum proposes to take. The British Museum takes the view that the powers of the Attorney-General to sanction the relinquishment of material from the collections of the Museum should be established before other avenues to relinquishment (such as statutory amendment) are explored.

¹⁶⁸ This is a summary of the more detailed analysis of the modern legal position in England and Wales which is found at Appendices 2 and 4, also 1 and 3. An account of some relevant overseas laws can be found in Chapter 5.

Property in human material

269. It is a general rule of English law that there can be no property in a corpse.¹⁶⁹ The rule appears to extend to stillborn children, to parts of bodies such as limbs, skulls or internal organs, and to other human material. Though obscure in origin, and subject to important exceptions, the general rule has been twice upheld by the Court of Appeal over the past seven years and must be taken as established.¹⁷⁰

270. This rule could be held to have a number of legal consequences, particularly in terms of preventing the enforcement of property rights (though many questions are undecided). For instance, the rule might prevent an aggrieved party from enforcing rights that would be open to those dealing in any other form of tangible matter (such as animal remains). If someone purports to buy a Scythian skeleton and finds that the ‘seller’ is not the ‘owner’, or that the skeleton is a fake, the normal remedies under the Sale of Goods Act as to title and compliance with description might not assist the buyer.¹⁷¹ If an aggrieved descendant of a person whose remains are in a museum takes the remains without the museum’s consent, that may not be theft (though it may be a different offence).¹⁷² Human material is almost certainly excluded from statutes which suppose the existence of ‘property’ or ‘goods’.¹⁷³

271. On the other hand, it could be argued that if human remains are not property, museums are not prevented from disposing of them, and that this freedom exists even where the museum is governed by legislation that prohibits the disposal of its property. But even this is not clear-cut. For instance, the provision in the British Museum Act 1963 which generally restrains Trustees from disposing of any object ‘vested in the Trustees as

169 See *R v Sharpe* (1857) Dears. & Bell 160; *R v Lynn* (1788) 2 T.R. 733, 100 E.R. 394; *Foster v Dodd* (1867) L.R. 3 Q.B. 67 and *R v Price* (1884) 12 Q.B. 247. See generally Paul Matthews, ‘Whose body? People as property’, in *Current Legal Problems* (1983) p193 and Tristan Shek, op.cit. p 265.

170 *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474, CA, noted by Norman Palmer in *Art Antiquity and Law* 1(1996) p 414; and *R v Kelly and another* [1998] 3 All ER 741, CA, noted by Norman Palmer in *Art Antiquity and Law* 3(1998) p 299. Summaries of these cases are provided in Appendix 4.

171 Sale of Goods Act 1979, ss 12, 13.

172 Theft Act 1968, s 11.

173 For example, the provisions of the Torts (Interference with Goods) Act 1977.

part of the collections of the Museum’¹⁷⁴ may take effect free of the no-property rule. On the other hand, the use of the word ‘vested’ may still limit the restraint to those objects owned by the Museum, since vesting might be thought to imply property. The three lawyer members of the Working Group favour the latter view, while recognising that some forms of human material may have become property through human intervention that transforms it.¹⁷⁵ In the latter case, the transformed material would fall squarely within the embargo on disposal.

Burial rights

272. Personal representatives of deceased persons are generally entitled to the possession of the body for purposes of burial.¹⁷⁶ Under the law of England and Wales, the body must generally be delivered to the executors where the deceased leaves a will, and to the administrators where he or she dies intestate.¹⁷⁷

273. There are indications from overseas case law that the right to bury the remains of a deceased person may be invoked by genealogical and cultural descendants in their local courts long after the death.¹⁷⁸ In theory such rights might be used to obtain possession from a museum, either at home or overseas. It is not certain, however, that an English court would grant letters of administration¹⁷⁹ to the remote cultural descendants of a

174 British Museum Act 1963, s 3(4); see further s 5(1) which contains limited powers of disposal.

175 Paras 274-275.

176 See *Williams v Williams* (1882) 20 Ch D 659 at 665.

177 This was held in *Dobson v North Tyneside Health Authority* [1997] 1 W.L.R. 596, although the rule did not operate on the facts of that case. See also *In the Estate of Dayne Kristian Childs, Buchanan v Milton*, 27 May 1999, (2000) 53 BMLR 176. Exceptionally, others might be given this right and this could in theory include culturally related indigenous people. This case is also summarised in Appendix 4. Compare the case of the artist Robert Lenkiewicz, whose executors (the Lenkiewicz Foundation) were held by the Plymouth and South Devon Coroner (Nigel Meadows) to be entitled to possession of the embalmed corpse of a 72-year-old man (Edwin MacKenzie) found in a chest of drawers at the artist’s studio at the Barbican after the artist’s death: see *The Times*, 12 October, 12 November 2002 and *The Independent*, 12 November 2002. The coroner is reported as having said (*The Times*, 12 November 2002): ‘I am satisfied that the late Robert Lenkiewicz obtained lawful possession of the body originally and that while it was in his possession he arranged for it to be embalmed. In my view this process gave him the right to continued possession.’ See further on the latter point below paras 274-275.

178 See Professor Patrick O’Keefe, ‘Maoris claim head’, in *International Journal of Cultural Property* 2(1992) p 393. The grant of letters of administration by a court in New Zealand contributed to the successful opposition by a Maori group to the auction at Bonhams of the tattooed head of a Tupuna warrior in 1988. A summary of this case is found at Appendix 4.

179 In other words, the official grant of the right to administer the estate of a person who has died leaving no valid will.

person who died many decades ago, or even whether such a court would necessarily give effect to the grant of letters of administration by an overseas court. There is the further question whether a right of delivery for burial would be recognised in opposition to a museum statute prohibiting disposal.

Artefacts

274. The difficulties of the no-property rule are further accentuated by the existence of exceptions. It does not apply to forms of material which might justifiably be treated in the same way as human remains but which, either because they are formed into artefacts or are not strictly human remains, attract different legal principles.

275. The main case is the artefact which derives wholly or partly from human material, but has become something different in law by reason of the application of skill and labour.¹⁸⁰ Mummies may well fall into this category, as might those items (such as bone, skulls or hair) which have been made into artefacts. An example may be the Aztec drinking-vessel fashioned from a skull, which was exhibited at the Royal Academy in 2002–03. Some religions and cultures may see no difference between such artefacts and unaltered human remains, and may question why a collector should be allowed to enhance his or her rights by interfering with human remains, so that altered remains become legal property, while unaltered remains do not. We feel that the no-property rule contributes nothing to the resolution of claims by introducing this distinction between unaltered human remains and artefacts made of human material.

180 See *R v Kelly* (see note 170) where Rose LJ. stated at p 749: 'parts of a corpse are capable of being property within s. 4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.' See also *Doodeward v Spence* (1908) 6 CLR 406 per Griffith CJ at pp 413-414 and Appendix 4 for a case summary. And see further the case of the corpse embalmed by Robert Lenkiewicz, note 177.

Legal position of museums

276. The legal position of museums is as follows:

- i. National museums are generally prohibited by law from disposing of objects which are vested in them and comprised in their collections, except where they are duplicates or are unfit to be retained, and can be disposed of without detriment to the interests of students.¹⁸¹
- ii. Local authority museums appear in general to have no statutory restraints on disposal: there is certainly no explicit restraint in the Public Libraries and Museums Act 1964, which governs most local authority museums.
- iii. Some museums, such as university and independent museums, may be restrained by their charitable status, but the position is unclear, since it may be argued that a university's main objects are teaching and research and that the retention of museum items is not a principal object.

277. In none of these cases is the legal position entirely clear-cut, and even where a prohibition appears to exist there might be ways of avoiding it. For instance, a national museum might construe the words 'unfit to be retained' as including cases where it is morally repugnant to retain an object. This has the advantage of requiring no change in the law, and of allowing all claims to be considered on a case-by-case basis. On the other hand, it is a route which could be successful only in a limited range of cases. However, in the event that a court were to find that the retention of human remains breached the Human Rights Act 1998 (HRA), the court would be obliged to interpret the museum's legislation so far as possible consistently with Convention rights.¹⁸²

¹⁸¹ Special rules apply to printed matter, to gifts and bequests and to objects which are so damaged as to be useless – s.5 of the British Museum Act 1963; details of the relevant legislation are given in Appendix 1.

¹⁸² See para 282. This summarises the advice which is set out in Appendix 3.

278. Another possibility might be to invoke certain provisions of the Charities Act 1993 which would enable permission to be granted to a museum to perform acts of return which are contrary to its objects and would not otherwise be lawful in an institution having charitable status. But the conditions of application are extensive and onerous, and they could in any event benefit only those museums that are charities; and we know of no case in which a museum has invoked them to release objects from its collection. It is, moreover, uncertain whether powers available under section 27 of the 1993 Act can be invoked where they would be used to override statutory prohibitions on disposal. Its use might effectively be limited to other museums which have charitable status, such as university museums. In addition, it is not clear whether section 27 applies to human remains at all since it refers to the application of ‘property’.¹⁸³

279. A third possible route to disposal is the use of a Regulatory Reform Order under the Regulatory Reform Act 2001. Such Orders may be made by Ministers to remove ‘burdens’ in existing legislation, which may include restrictions or limits on statutory powers. Although in theory this appears an appropriate route, we understand that legal doubts have been expressed about its applicability to the case of national museums,¹⁸⁴ and that the pressure for Orders is such that the process is likely to take as long as primary legislation.

Effects of legal uncertainty

280. One of the disadvantages of the present uncertain state of the law in England and Wales is that it tends to encourage museums to adopt a legalistic approach to questions of possession and return. Such an approach is often alien to those seeking the return of remains. In particular, it tends to lead museums to place the emphasis on formal or procedural issues at the expense of a sympathetic exploration of the substantive issue. For claimants and museums, the legal position of museums is confusing and without any

¹⁸³ As to the position of the British Museum, see para 268.

¹⁸⁴ See Mason, *op. cit.* p 1. A summary of this article is found at Appendix 4.

clear rationale: claimants and museums can in effect find themselves speaking different languages. The result is that intelligent and sympathetic dialogue between the parties is even more difficult than it need be. We see this as a very strong argument for changing and clarifying the present law.

281. The UN Draft Declaration on the Rights of Indigenous Peoples 1993 (Draft Declaration)¹⁸⁵ would make it unequivocally clear that indigenous peoples have the right to repatriation of human remains. However, the Draft Declaration has not yet been finalised and even when adopted will not have direct effect in English law. More details about the Draft Declaration are set out elsewhere.¹⁸⁶

Human Rights Act 1998

282. We have taken independent legal advice on the implications of the HRA for claims for the return of human remains. The full advice is reproduced in Appendix 3; the following are the main points.

283. For the purposes of HRA, those museums that are governed by statute, or which rely on public funding, are likely to be regarded as ‘public authorities’ against which proceedings can be brought. The status of other museums would depend on their constitutions and whether they could be considered as performing a public function. Where a museum is prevented by statute from disposing of human remains, it would be the duty of the court to interpret the relevant statutory provisions as far as possible consistently with Convention rights. If this were not possible, it would be open to the court to make a declaration of incompatibility. Although this would not have an immediate effect on the case before the court, such a declaration would place the Government under strong pressure to amend the offending legislation.

185 The United Nations Draft Declaration on the Rights of Indigenous Peoples 1993. This document is set out in Appendix 5.

186 See paras 190–191 and Appendix 5.

284. HRA is not limited to the protection of the rights of persons living in the UK. However, only a person directly affected by a breach of a Convention right can bring proceedings as a ‘victim’: the issue would therefore be whether the manner in which the remains of the dead are treated could affect the human rights of the living. The concept of ‘victim’ could arguably include not just close relatives but indigenous communities or peoples. The representatives of such people would have standing to bring an action under HRA.

285. HRA excludes claims where the wrong alleged took place prior to entry into force of the Act. However, a claimant could argue that the retention of human remains is a continuing wrong and that time should run from the date a request for their return has been made and refused.

286. The law in this area is so far untested, but it is possible that action to contest a refusal to return human remains could be taken under Article 3 of the Convention (protection against inhuman or degrading treatment); or under Article 8 (respect for family and private life); or under Article 9 (right to freedom of thought, conscience and religion); or under Article 14 (prohibition of discrimination); or under Article 1 of Protocol 1 (protection of property). Each case would need to be considered on its merits. In the case of Article 3, the prohibition of inhuman or degrading treatment is absolute, but the abuse must attain a certain degree of severity before Article 3 is breached. In the case of Articles 8, 9, and Article 1 of Protocol 1, the right of an indigenous people to the return of the remains in question would need to be balanced against the public interest served by their retention. Article 14 would come into play in the event of discrimination with regard to other rights protected by the Convention.

Conclusion

287. In our view, the present state of the law is seriously unsatisfactory. It is contradictory and creates uncertainty on numerous points. As we observe, it requires museums to take an excessively legalistic approach to restitution issues. Even more

importantly, it blocks (or at best inhibits) the exercise of discretion by many of the museums with the most important holdings of human remains; there is no legally infallible way of avoiding the present statutory prohibition on disposals.

288. We recommend that distinctions between museums in this respect should be abolished and that all human remains held in public museums should be subject to a common policy. We further recommend that where there is a statutory bar on return, it should be removed and the museum concerned should be enabled to make independent decisions on this matter. In the case of the national museums this would probably require primary legislation.

289. The recent emphasis on alternative dispute resolution in civil proceedings offers a promising development, and one which should in our opinion serve as a model for the present case. We believe that it should be explicitly adapted by Ministerial consent for the purposes of claims for human remains. So much has been done in the case of the Spoliation Advisory Panel and we believe that an equivalent process should be implemented here.¹⁸⁷ Dispute resolution procedures should in our view be combined with a radical clarification of the legal nature of a museum's custody of human remains.

290. Having regard to our other recommendations, we do not recommend a statutory reversal of the no-property rule, for all its shortcomings. The Department of Health proposes to leave the rule unaffected for human tissue and organs held by medical institutions and we believe that a satisfactory result can be accomplished within our field by a statutory, regulatory and dispute-resolution programme that effectively bypasses or at least marginalises the rule.¹⁸⁸ Any wider modification could have effects outside our

¹⁸⁷ We have more to say about the possible role of panels in Chapter 11.

¹⁸⁸ See para 194. Cf. the judicial approach to the question of property in confidential information: *Smith Kline and French Laboratories v Secretary to the Department of Community Services and Health* (1990) 17 IPR 545 at 593 per Gummow J; *Breen v Williams* (1996) 138 ALR 259, High Court of Australia; and see Norman Palmer and Paul Kohler, 'Information as Property', in Norman Palmer and Ewan McKendrick, eds., *Interests in Goods* (2nd edn., 1998) pp 3-24.

field that would need very careful analysis.¹⁸⁹ We do, however, recommend that further work be done to clarify the principles by which human remains become property through the application of human skill and labour,¹⁹⁰ and that steps should be taken to advise museums accordingly.

Possible legislative remedies

291. The question remains as to the legislative methods by which museums currently restrained from disposing of human remains might be empowered by statute to dispose of them. We here set out the forms of possible legal provision, together with some account of their respective drawbacks.

Method 1

292. Repeal the relevant sections of the prohibitive statutes (e.g. British Museum Act 1963, s 5) leaving the question of disposal to a museum's discretion, as appears to be largely the case with local authority museums at present (and a significant number of national museums overseas).

293. *Possible objections:* This would widen museum powers of disposal further than are needed for the immediate purpose, would require *ad hoc* amendment of a series of single statutes, and do nothing to clarify the position of local authority and university museums. The first objection could perhaps be met by imposing specific continuing constraints on (for example) the purposes for which disposal could be made, or by ensuring that a second layer of control continued to exist through the Charities Act 1993 and the rule that a charity must act in accordance with its objects, which rule would be offended by a disposal contrary to those objects unless the relevant consent were obtained

¹⁸⁹ There is, of course, nothing in principle to prevent a statute from explicitly conferring property and associated rights over human remains on particular legal or natural persons for particular purposes, though the human rights implications would require careful evaluation. An example of such legislation is the Heritage Resources Act 1985 (Manitoba), by s 45 of which 'The property in, and the title and right of possession to, any human remains found by any person after May 3, 1967, is and vests in the Crown.' Section 46 of the Act imposes a duty to report and refrain from disturbance.

¹⁹⁰ Paras 274-275.

under section 26 or 27 of the Act. But the issue could still be controversial and threaten to provoke opposition.

Method 2

294. Enact a single specific statute empowering the Minister to exempt by Order any object or category of object from the current statutory prohibition on disposal.

295. *Possible objections:* This would widen powers of disposal further than are needed for the immediate purpose, would do nothing to clarify the position of local authority and university museums, and would require substantial Parliamentary time. As with Method 1, the first objection might be met by imposing specific continuing constraints on the circumstances in which disposal could be made, or by ensuring that a second layer of control continued to exist through the Charities Act 1993.

Method 3

296. Enact a specific statute empowering disposal whenever a museum notifies the Minister of its wish to dispose of a particular item of human remains or a particular category of human remains from its collection. The statute would be peculiar both to the particular museum and to the particular human remains. A model might be the Australian Constitution (Public Record Copy) Act 1990.¹⁹¹

297. *Possible objections:* This would require *ad hoc* and possibly serial amendment of individual museum statutes as individual cases arose, and could spawn an unmanageable proliferation of statutes. Interrelation with the law of charities would need to be rationalised, presumably but not necessarily by providing that disposal under this authority would occur free of the normal constraints operating under the law of charities.

¹⁹¹ A discussion of this single-provision piece of legislation is found in Chapter 5, para 212.

Method 4

298. Amend individual prohibitive statutes to give a power of disposal solely in respect of human remains. This could be done by simply stating that the sections prohibiting disposal do not apply to human remains, or by enacting a further statutory exception for the specific case of human remains, with specific criteria as to proper conditions of disposal if required.

299. *Possible objections:* This would require *ad hoc* amendment of a series of single statutes, and would do nothing to clarify the position of local authority and university museums. Interrelation with the law of charities would possibly need to be spelt out.

Method 5

300. Add a special interpretation clause to prohibitive statutes stating that unfitness for retention shall be deemed to include moral unfitness.

301. *Possible objections:* This would apply only to statutes that use the concept of unfitness for retention, would require *ad hoc* amendment of a series of single statutes, and could widen powers of disposal further than are needed for the immediate purpose. The last objection could be removed by limiting the moral unfitness exception to human remains.

Method 6

302. Enact a single specific statute empowering any museum (or, if preferred, any national museum) to dispose of human remains, with specific criteria as to proper conditions of disposal if required.

303. *Possible objections:* This would require Parliamentary time. Interrelation with the law of charities would need to be rationalised.

Method 7

304. Enact a single specific statute empowering the Minister to exempt by Order any item of human remains or any category of human remains from the current statutory prohibition on disposal, or authorising such disposal where the position is uncertain.

305. *Possible objections:* This would require Parliamentary time, and might have no advantage over a Regulatory Reform Order. Interrelation with the law of charities would possibly need to be spelt out.

306. *Note:* Each of the foregoing methods would require primary legislation. For completeness one should also mention:

Method 8

307. Implement a Regulatory Reform Order, relieving a particular museum from the obligation of compliance with the restrictions in its governing statute on specified terms. Such an Order would take effect as subordinate legislation.

308. *Possible objections:* The advantages and disadvantages of this device have already been examined¹⁹² and are not developed here. There is doubt as to the viability of this device and as to the amount of time involved.

Imperative legislation

309. Overseas legislation. Certain overseas statutes compel the return of human remains from designated museums. Two of these statutes (Tasmania, USA)¹⁹³

¹⁹² Para 279.

¹⁹³ The Museums (Aboriginal Remains) Act 1984 applies to the collections of the Tasmanian Museum and Art Gallery and to the Queen Victoria Museum and Art Gallery. In the USA, the Native American Graves Protection and Repatriation Act (NAGPRA) 1990 (Public Law 101-601, 16 November 1990) applies to either state or local institutions which receive Federal funding and which have in their possession or control human remains and associated funerary objects. This legislation has no application to the collections of the Smithsonian Institute or any other Federal Agency. For a detailed discussion of these statutes, see Chapter 5.

contemplate only an internal relinquishment to recipient groups within the particular political unit,¹⁹⁴ while a third (France) commands a single cross-border repatriation.¹⁹⁵ There are extensive differences in both scope and technique between the three statutes, and the political impulses behind them are also diverse. We submit that they have only limited value as a potential model for any English statutory reform.

310. That nevertheless leaves open the question whether some form of imperative legislation is the proper solution for England in the present circumstances. Such a question is within our terms of reference and we have given it anxious consideration.

311. The case for repatriation. We begin by reminding ourselves of the case for repatriation. In its most emphatic and least compromising form, the case might be stated as follows.¹⁹⁶

1. To many indigenous peoples the return of their ancestors to the homeland is essential to the health of the descendant community. Such a community should be allowed to decide for itself how its members are treated. Any derogation from this principle is a discriminatory subordination of indigenous peoples and a demeaning relegation of them and their concerns to inferior status. It also prevents them from fulfilling a solemn obligation, the neglect of which causes acute pain. There is little question that the original taking of these remains was often morally, if not legally, wrongful, that such dispossession would not be tolerated today, and that English museums will no longer acquire indigenous remains in violation of

194 Whereas nothing in NAGPRA compels the return of human material to overseas claimants or destinations, some US museums have made such returns since the statute came into force. The most recent appears to be the handing over by the Field Museum in Natural History at Chicago of the bones of 150 Haida people to a Haida tribe in British Columbia, said to be only the third such cross-border return by a major US museum: see *NMDC Newsletter*, April 2003.

195 Loi 2002-323, 06 mars 2002 which provided for the return of the remains of Saartjie Baartman from France to South Africa in 2002. This Act is set out and discussed in Chapter 5 at para 217.

196 Of course, not all claimants or other interested parties would subscribe to so emphatic a view, and many scientists would put vigorous counter-arguments. But the balance between these is measured elsewhere: see Chapter 4.

the wishes of their parent communities. Why, then, should it make any difference that particular remains are already in the possession of a museum?

2. Until this wrong is redressed, there will be no closure in respect of past injustices and an arguable enduring violation of fundamental human rights. The physical and psychological health, and indeed the social advancement, of indigenous communities are in consequence impaired. No other class of society finds its lack of consent overridden, its autonomy subverted, and its spiritual needs unilaterally subordinated to other interests in this way. Equality and justice demand the return of ancestral remains. People grieve and will continue to grieve until the spirits of their ancestors are at rest.

312. Mandatory divestment? We accept without question that these are serious arguments worthy of the highest respect. But we do not believe that they compel the immediate adoption of legislation forcing museums to relinquish human remains. Such legislation may become appropriate in the light of future events, such as the assimilation into UK law of the Draft Declaration, or a ruling that the retention of human remains offends human rights, or some legal decision that indigenous claimants have property or the right to possession over the remains of their ancestors, or other compelling circumstances. Even in those events it appears unlikely that a museum would resist the return of the remains in question, rendering legislation necessary. But, for the present, we believe that the arguments for repatriation are sufficiently answered by the adoption of permissive legislation supplemented by public regulation and a credible claims procedure.

313. First, any immediate recommendation that remains be repatriated would need to be accompanied by criteria for the identification of those remains: a list or definition. But the process of quantifying and attributing the collections of human material in museums has only recently made significant progress and has not yet reached a stage where such criteria could be definitively stated. It is still hard to identify in general terms what might be returned compulsorily.

314. Secondly, it is also hard to prescribe in a statute the process of evaluation that is necessary to an informed and balanced decision about the return of human remains, or the circumstances in which matters other than indigenous rights and responsibilities have a legitimate bearing on such decisions. We have, for example, been at pains to distinguish those circumstances in which museums should treat the opinions of cultural descendants as paramount and overriding and those in which they should be taken into account as part of a consultative process.¹⁹⁷ These are matters that require careful sifting on a case-by-case basis. In our view such matters are more appropriately dealt with by an official advisory panel than by legislation. It would always be open to such a panel to recommend any appropriate legislative change.

315. Thirdly, the enactment of imperative divesting legislation at this stage could jeopardise relationships that might otherwise flourish. We have been impressed by the suggestions from some indigenous peoples as to the contributions they might make to the knowledge and experience of English museums and to the study of living cultures. We have also been impressed by the response of some museums to such proposals. In the present climate, though we acknowledge that the spirit of trust and amity is not universal, we prefer an approach that gives such initiatives the chance to take root unhindered by adversarial or unilateral intervention.

316. Fourthly, the question of mandatory legislation raises fundamental issues about the wider relationship between Government and museums, about museum policy in general and about the legal rights of museums. We are not sufficiently informed about the interplay of political and economic forces in this field to suggest with confidence an overriding of the autonomy of museums in this matter. We also note in this connection a possible argument that to deprive museums (or museum trustees) of material from the collections vested in them might infringe their right to peaceful enjoyment of their possessions under Article 1 of the First Protocol to the European Convention on Human Rights. However a museum that is a public authority is unlikely to qualify as a ‘victim’

¹⁹⁷ See Chapter 7.

for the purposes of bringing proceedings under the HRA (see paragraph 48 of Appendix 3).

317. Fifthly, we note that divesting legislation is entirely absent from the statute books in Canada and New Zealand and exists in Australia only in one highly limited case (Tasmania) where the statute relates to particular identified remains in two identified museums.¹⁹⁸ We incline provisionally to the view that, if mandatory divesting legislation were ever to become appropriate in England, it would be most satisfactorily introduced on a case-by-case basis, similar to that of the Tasmanian or French enactments cited earlier, rather than on the more general basis exemplified by NAGPRA.

318. That said, we believe that the Department for Culture, Media and Sport (DCMS) should keep the matter under review in order to monitor developments and reflect changed attitudes and conditions. Such review could reconsider the form of legislation as appropriate and keep the dispute resolution method in repair. Divesting legislation has already been enacted in at least one area arguably less compelling than the present: see the Australian Constitution (Public Record Copy) Act 1990, discussed in Chapter 5.¹⁹⁹

319. We recommend that advisory criteria be prescribed for determining whether such legislation should be enacted. We accept, however, that this expedient should be a last resort where other means have failed, and that there should be no mandatory divesting legislation in present conditions, assuming that our other recommendations are adopted.

Ministerial intervention

320. We are tentatively attracted by the suggestion, to some degree paralleled in Australian legislation, that DCMS might lend its good offices towards the attainment of a resolution where all other approaches to a claim or controversy have failed to achieve an

¹⁹⁸ See footnote 142.

¹⁹⁹ Para 212.

amicable settlement. Of course any such initiative must be approached delicately and applied only sparingly.²⁰⁰ But its recognition as a possible solution has the advantages of suggesting that every avenue will be explored to reach an amicable settlement and of showing respect and concern at the highest level.

321. It should be emphasised that we do not envisage the exercise of any compelling power by virtue of such intervention. Even so, there is a view that the attenuated form of involvement we propose might have profound complications for the status of trustees in national museums where, under their existing duties and responsibilities, they might not feel bound by any such intervention.

322. The Australian legislation to which we refer is section 21X of Division 4 of Part IIA (headed 'Victorian Aboriginal Cultural Heritage') of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. Under this provision (which applies to the state of Victoria): 'If a local Aboriginal community has reason to believe that any Aboriginal remains held by a university, museum or other institution were found or came from its community area, the local Aboriginal community may request the Minister to negotiate with the university, museum or other institution for the return of the remains to the community.'

323. We appreciate that the circumstantial parallel is not exact and that the matter requires thought, but we consider the inherent principle at least worthy of further consultation.

²⁰⁰ It has been suggested to us that other devices (such as an approach to the Attorney-General under the Charities Act 1993: see paras 268, 278) might offer a preferable solution.

Chapter 7: Consent

General

324. In Chapter 2 we examined the volume and source of human material currently within the collections of English museums and other institutions. In Chapter 3 we examined the circumstances in which human remains left their original location and came to reside in such collections. In Chapter 5 we noted certain Department of Health (DH) proposals under which consent is to become the first guiding principle for the holding and use of human organs and tissue acquired in the future by medical institutions.

325. We now seek, in the light of those matters, to answer five main questions:

1. How far should Government seek to achieve parity on matters of consent between (a) the future acquisition, retention and treatment of human remains by hospitals and similar institutions (where consent is now paramount) and (b) the continued retention and future treatment of human remains within existing museum collections?
2. Do English collections contain a significant number of human remains that were originally removed without the consent of (a) the deceased person and (b) those members of the deceased person's family or community who might reasonably have expected to be consulted about the removal?
3. Is such lack of original consent to be regarded purely as a historical fact, no longer contentious in the light of modern conditions, or should it be regarded as a continuing barrier to the retention and treatment of human remains within museums and other collections?

4. When, if at all, should circumstances arising after the original removal of an item of human remains be deemed to confer a consent which might otherwise be lacking, or justify the admitted absence of consent?
5. Where consent is not an issue, should the current holder enjoy unfettered liberty to deal with human remains, subject only to existing law?

Some prefatory remarks

Principle not law

326. Our aim in considering these questions here is not to establish whether some legal wrong (such as a crime or a tort) was committed by a remover or recipient museum, or whether legal redress is now available for that wrong. Whether or not the particular taking of human remains violated existing laws, the time for legal redress in respect of any such wrong is probably long past. Our purpose instead is to try to relate the circumstances of the original removal to the live contemporary question of consent.

Consent: a guiding principle?

327. Existing museum practice. Every museum accepts (or would, if the question arose) that certain people connected to a deceased person must have autonomy over the remains. Such people have, by virtue of their relationship, an overriding right to possession of the remains, and an exclusive power to decide whether research shall be conducted on them. In the face of such a relationship, it is accepted that scientific interests become subordinate, deferring to other values. An example is the policy of the Duckworth Laboratory in Cambridge. This policy commits the Laboratory to the return of any individual skeletons or skulls of named individuals if the close kin of the deceased

person should want them.²⁰¹

328. Such recognition accords in part with the long-established legal right of personal representatives of a deceased person²⁰² to demand possession of the body in order to bury it.²⁰³ The museum approach appears, however, to extend beyond cases where those calling for return have a *legal* right to possession.

329. Of course, the precise degree of relationship that must be shown to invoke this overriding power may be controversial. Not all institutions would limit the undertaking to return to the remains of *named* individuals, and many museums might define differently the range of persons to whom return must be made. Those are points on which reasonable institutions may differ. But this is a matter of degree rather than of substance. Leaving such controversies aside, we have seen nothing to suggest that the *principle* of consent is unacceptable to English museums, provided that it is intelligently formulated and consistently applied.

330. The Department of Health proposals. The DH has, as we have seen, adopted the principle of consent as the cornerstone of its modern policy on the future acquisition, retention and use of bodily material by medical institutions.²⁰⁴ Consent is declared to be the first guiding principle in such cases.

331. So much is plain from the DH document detailing its *Proposals for Future Legislation on Human Organs and Tissue*. This document, issued in September 2003, declares the purpose of the proposed legislation to be the provision of ‘a consistent legal framework for all issues relating to the taking, storage and use of human organs and tissue’. It identifies consent as the first of six ‘key points’ which might be covered by the

201 See para 184 where the relevant section of the policy is quoted verbatim.

202 That is, the executors if the deceased has left a will, or the administrators if there is none.

203 Para 59.

204 Chapter 5.

new Bill: 'Future legislation might provide ... for consent as the explicit, underpinning principle in the removal, storage and use of bodies, body parts, organs and tissue.'

332. The document continues:

We would expect consent to be the basis on which lawful taking, storage and use of all tissue, including whole or part organs, would be determined. This is on the principle that, in general, a person should be able to determine what happens to his/her body or to any of its parts. Established conditions for obtaining valid consent from a person would be implicit here: i.e. sufficient information, in a form the person could understand, and consent to be given voluntarily, not under duress nor undue influence from health or other professionals, family or friends.

333. Consent critical but not retrospective. The DH proposals are envisaged as purely prospective. In the words of the explanatory document, they are not intended to affect past activity, and the parent Bill would not therefore have retrospective effect. Existing collections are not covered.

Extending the parallel

334. Museums, on the other hand, are almost exclusively concerned with existing collections. It is unlikely that an English museum will engage in any contentious acquisition of human material in the future. The question is whether, and to what extent, consent should be an overriding condition of the future retention and use of human remains that are *already* within the existing collections of museums and similar institutions.

335. This gives rise to subsidiary questions. If consent is the key, are the circumstances in which human remains were originally removed the sole indicator of consent to contemporary possession? Should an apparent original consent to removal be re-examined, and perhaps subordinated to other concerns, in keeping with modern values?

Can later events in some way erase an original lack of consent and validate the museum's current holding? Who are the people from whom consent should now be sought? What happens if they do not give it?

Reopening the wound

336. The question may also be asked whether it is right to revive these matters when the general tenor of this Report is to look forward rather than back, to build future relationships rather than revive past wrongs. The question is a fair one, but the nature of this issue is for many people so emotive that to them recognition should precede closure. To acknowledge what happened is to show respect for those to whom it happened and to help the healing process. Moreover, as we have seen, consent is at the heart of the DH proposals on future-acquired human organs and tissue.²⁰⁵ If consent is to occupy an equivalent place within our own proposals, it becomes necessary to examine the circumstances of removal.

Parity: the first question

337. *How far should Government seek to achieve parity on matters of consent between (a) the future acquisition, retention and treatment of human remains by hospitals and similar institutions (where consent is now paramount) and (b) the continued retention and future treatment of human remains within existing museum collections?*

338. In essence, the question is whether consent should be the paramount consideration, not only in regard to holdings of future-acquired human remains within medical institutions, but across different cultures, holding authorities and time spans.

339. We believe that if the principle of consent is justified it should apply regardless of the nature of the institution that holds the particular remains and regardless of whether

205 Paras 199, 330-332.

those remains are already within an existing collection.²⁰⁶ The greater question concerns the range of persons whose consent should be regarded as essential to the future retention and treatment of human material.

The points of agreement

340. We are unanimous on the following points:

- The wishes of the deceased person are paramount and should transcend the interests of science, provided that three conditions are fulfilled: first, that the deceased person's lack of consent is either known to the museum or plainly evident from cogent evidence available to the museum; secondly, that there is an existing person or group claiming or otherwise advocating the return of the remains; and thirdly that the existing person or group satisfies the test of closeness of relationship which we prescribe elsewhere. If the claimant person or group satisfies that test, the museum must comply with the wishes of that person or group, regardless of the value of the remains to science. It follows that where the claimant refuses to consent to the proposed treatment of the remains the museum must not cause or permit that treatment to occur. Treatment includes for this purpose, of course, any proposed retention of the remains. If, on the other hand, the claimant person or group does not satisfy the test of closeness of relationship, the museum is not bound to comply with the wishes of that person or group, though it may decide to do so. In this situation, the museum must nevertheless consult the views of the claimant person or group,²⁰⁷ and take those views fully into account.
- Where the deceased person is identified, and the claimant is a close relative or genealogical descendant of that person, the museum should relinquish the relevant

²⁰⁶ We accept, of course, that our terms of reference are limited to museums, and similar collections, and that the principles that are to govern existing holdings of human material within medical institutions are for other authorities to determine.

²⁰⁷ Below and para 346. We place one relatively marginal qualification on this proposition, which we examine under the sub-title of 'culturally-isolated remains': para 382 et seq.

human material in favour of the claimant, irrespective of the value to science of retaining it. In these circumstances it is right to accord priority to the interests of the claimant over the interests of science. It follows that consent is paramount in such circumstances. Without consent to their being retained the remains must be returned.

- Museums should be prepared, subject to proper procedures and guarantees, to consider ways of sharing access to and custody over human remains in order to enable the deceased person, and that person's close relatives and genealogical descendants, to be identified.
- In determining questions of detention and treatment, museums should take full account of the declared wishes of other persons or groups with an appropriate interest in the remains, such as the source community, cultural descendants and representatives of the country of origin, at least where exact provenance cannot be established.
- Subject to the proper recognition of cultural diversity, it is reasonable to take account of the age of human remains in considering the treatment and destination of such remains. The identity of the remains as ancient remains (i.e. those dating from before 1500) may be particularly material in this regard. At the same time, we believe that institutions should bear in mind that time is understood differently by different communities, and that no single element in the search for descendant status should be treated as universally decisive, divorced from other elements.
- The authority of representative and advocacy groups must be underpinned by a proper mandate from the source community. Such authority might be derived by direct consultation with, and support from, the specific community, or by appointment from government or other agency through the normal democratic process. We accept, of course, that this concern will be felt at least as deeply by the representative and advocacy groups themselves (who will be accountable in

their homeland for any excess of mandate) and that it is in their interests to be able to demonstrate a clear line of authority.

- Within the framework of general principle stated in this Report, all claims should generally be considered on their own merits, in the light of their particular circumstances. Claimants should be prepared to go forward with the evidence they have, and to accept that museums may want to examine carefully their genealogical and cultural connection with the deceased person before making a decision: mere assertion will not suffice. Museums should accept that, while a claimant may in principle carry the burden of showing the necessary connection, responsibility for determining the issue fairly lies, in the first instance at least, with the museum. Discharging that responsibility may involve sharing and exploring evidence in a cooperative manner, rather than taking a purely defensive or judgemental stance.

341. Whereas a minority of the Working Group would stop at that point, however, a majority would take the principle of paramountcy of consent still further.

The points of divergence

The first view

342. The minority believes that, outside the sphere of close family relations and direct genealogical descendants, the paramount need for consent should be supplanted by a duty of consultation. From this it would follow that parties who assert an interest in human remains, but do not satisfy the test of direct family or genealogical descent, would have the right to be consulted about any proposed treatment (such as retention and research), but that their views, rather than being paramount, would be factors to be weighed alongside other considerations, including the scientific and social benefits of retention and research. In cases where claims are based on cultural affiliation with ancient or

unidentified remains, this group sees the issue as one of balancing the interests of claimants against those of science.

343. The minority points out that its proposals are still an advance on the DH policy, which is (as we have seen) intended to apply only to human material acquired in the future, and not to archive holdings. In the minority's judgement, an emphasis on consultation offers a balanced all-round view, which gives fair weight to social, familial and cultural associations, without allowing them to predominate in more remote cases. It also, in the minority view, allows due weight to be given to those instances where account needs to be taken of the importance of a particular collection as a whole, and of the place of the particular remains within that collection.

344. Two further related points are made in support of this view. The first is that all claimants who fall in this category must be given a clear understanding of the position with regard to consultation. This requirement is interpreted as meaning that, while claimants must receive fair treatment, they must be prepared for the possibility that the 'context of consultation' will be different from that of their home countries. The second is that cases will arise where indigenous communities have a right (subject to authentication of claims) to the return of remains from institutions within their own country, but no such automatic right in respect of remains held by English institutions. It is perhaps fair to say that this group would attach a slightly lesser persuasive force to the notion of reciprocity of treatment between overseas and domestic policies than the group whose views we next present.

345. Finally, the minority supporting this position emphasises the scientific mission of certain museums and the benefits that derive from its pursuit. The retention of human remains, even those that derive from communities still in existence and are held without their consent, may enable institutions to make invaluable scientific advances. Research on such material may produce valuable results for the communities who seek return, a quality which distinguishes human remains from (say) looted cultural objects withheld from dispossessed families. Further, the distinction from cultural objects may be thought

to be enhanced, and the argument for retention intensified, by the likelihood that returned human remains will be interred or cremated, or will otherwise cease to be available to scientific inquiry. Such a consequence does not of course follow from the return of many other cultural objects. Some institutions are reluctant to forgo such prospects and enable such loss.²⁰⁸

The second view

346. A majority of the Working Group has serious reservations about limiting the exclusive power of consent to those who have a close and direct genealogical relationship with the deceased person, to the exclusion of others whose relationship may (in the majority's view) demand comparable respect and prominence. To treat consent as paramount, irrespective of the claims of science, within the former group, while relegating it to merely one of several material factors, alongside the claims of science, within the latter group, appears to be insular and divisive. There is a serious risk that individual judgements based on such a hierarchy, proceeding from a presumption of scientific authority, will be seen as arbitrary and inequitable.

347. In the view of those who adhere to the majority position, consent should be the paramount and universal principle, in conformity with the DH policy on future-acquired human material.²⁰⁹ Consent, in other words, should be a threshold consideration in determining the legitimacy of *any* proposed treatment of human remains by museums. Once the principle is thus entrenched, attention can focus on the more important and delicate questions of *who* is an appropriately interested person or group and *whose* consent must be given. These are matters on which the advice of an independent

208 Of course, not all representatives of the scientific interest would subscribe to so emphatic a view: see generally Chapter 4.

209 We accept that the current policy of the Department of Health is less clear-cut on the question of *pre-existing* collections of human remains held by medical institutions. That is a question for the responsible authorities to determine, and we understand that the matter is under debate. But the existence of this area of debate does not, in the view of the majority, diminish the argument that the policy currently applied to future acquisitions by medical institutions affords a persuasive and workable model for the management of existing museum holdings, subject to the conditions prescribed in the text of this Report.

committee of experts, versed in belief systems and having no interest in the outcome, would be particularly valuable.

348. In the opinion of the majority, there is a risk that placing exclusive emphasis on close family and direct genealogical association fails to accord proper recognition to cultural diversity, by attaching predominant value to local or Western notions of kinship, and insufficient value to other belief systems.²¹⁰ Attention is drawn in this context to another principle adopted by the DH in its 2001 consultation paper, that of ‘cultural competence’.²¹¹ That is interpreted as requiring relevant authorities to ensure that ‘different attitudes to post-mortems, burial and use of organs and tissue are recognised’. Among its proposed set of guiding principles the DH at no point refers to the principle of respect for scientific research.

349. The view of the majority is that institutions should look to the particular culture or belief system in identifying the proper source of consent. The question is whether a culture or belief system bestows, on a particular person or group, a status or responsibility equivalent or comparable to that which our own society recognises as conferring authority to withhold consent in regard to future-acquired human material within medical institutions. If so, the consent of that person or group should be a precondition of any future act or omission in relation to the human remains concerned, and this condition will be overriding.

350. Of course, the application of the test will require consideration of the culture or belief system in question, and some regard to the equivalent practice in medical institutions. But we submit that that is a reasonable expectation, and consistent with proper standards of respect for cultural diversity. Moreover, the identity of the party whose consent is required will depend on some degree of association with the deceased person, and distance of time may be as relevant in that regard as distance of personal

210 See also the *Policy of the Royal Ontario Museum on the Repatriation of Human Remains of the Aboriginal Peoples of Canada*, set out in Chapter 5, para 222, note 135.

211 See Department of Health, *Human Bodies, Human Choices* (consultation report), Section 2, para 2.3. July 2002.

relationship. But that will be judged by the standards of the belief system at issue, and not by Western standards.²¹²

351. The majority believes that it is possible to redefine this question as a simple test of conscience: would it be offensive to the conscience of ordinary right-thinking people for an institution to pursue a particular course of conduct:

- without the consent of the particular person or group; or
- in direct violation of any express refusal of consent by that person or group?

352. In applying this test, a museum might find it appropriate to take account of factors additional to the degree of relationship between the deceased and the person or group asserting authority. Such an approach would accord with the case-by-case analysis which is generally accepted as desirable in this context. Examples of such additional factors might be the range of parties whose consent has been sought in *other* cases, the authority conferred on (or recognised in) a claimant group by the political or social unit to which it belongs, and the circumstances in which the particular human remains left their original place and reached their present place. It might also be appropriate, given the nature of the test and the undertaking assumed by museums to reflect public opinion,²¹³ to conduct a public consultation. In some cases, the circumstances that emerge might justify according greater or lesser authority to a particular related party. The greater the original wrong, for example, the wider might be the circle of appropriate consenting parties; conversely, the less heinous the original wrong, the narrower might be the circle of appropriate consenting parties. But there would be no hard and fast rules.

212 The question is difficult and this Working Group does not pretend that there is an easy answer. It must be emphasised, of course, that consent may be unnecessary or inappropriate in the particular case, because there exists no relevant affected person from whom a contemporary consent can be sought. Much human material currently in museums (for example, most Egyptian mummies) would seem to fall within this class (see further below). In other cases, one concerned person or group may decline consent while another may grant it, perhaps compelling some expression of preference on the part of the holding institution. But the principle at least could be sustained.

213 Para 399.

353. The result would be a two-fold division:

- Where the test is satisfied, consent is paramount and overriding.
- Where the test is not satisfied, the presence or absence of consent is a factor to be assessed within the overall evaluation, alongside the interests of science and other matters.

354. It is in the latter context only that consultation should supplant consent.

355. The majority group makes the following further points in support of its argument:

- The fact that the new Bill proposed by the DH will not apply to ‘past activity’ does not mean that the DH favours leaving uncontrolled and without remedy all pre-existing possession of human material removed in the past without consent. Before the new legislative proposals were formulated the Government had already set up the Retained Organs Commission (ROC) to supervise the distribution of existing holdings acquired without consent, and the ROC is not due to expire until 2004. Moreover, the ROC’s remit extends in any event only to post-1947 material. In its explanatory document of September 2003 the DH alludes to the possibility that future legislation might provide for consent in regard to existing holdings. The denial of retrospective effect to the new Bill should be seen in that context.
- A difference in treatment with regard to the question of consent between future-acquired human remains held by medical institutions, which are covered by the DH’s proposals, and remains already held by museums and similar institutions, could be regarded as discrimination and expose an institution that holds a pre-

existing collection of human remains to the risk of a challenge under the Human Rights Act 1998 (HRA).²¹⁴

- The majority position pays regard to the particular status and sanctity that indigenous ancestral remains possess for descendants and others. We record elsewhere²¹⁵ the beliefs of those who attended the Australian High Commission in London in April 2003, that the ancestors whose remains are kept in museums are to them living people. A similar point was recently made by a senior public servant of the Australian government. At a meeting in Canberra in February 2003 between the Chairman and Wayne Gibbons PSM, Chief Executive of ATSIC, concerning the types of Australian indigenous people whose remains are sought from English museums, Mr Gibbons made the point that: ‘We talk about them as living links – living people or peoples who knew living people. To us they are quite unlike most of the remains in English museum collections.’
- In a letter to the *Melbourne Age* dated 24 May 2003, Dr Michael Pickering, Repatriation Programme Director, National Museum of Australia, said:

"Statements from British scientists that the return of indigenous ancestral remains will result in a loss of scientific information (The Age, 17/5) are misleading and reflect outdated rhetoric, unsupported by evidence. Few, if any, indigenous Australian remains held in museum collections are of any great antiquity, being acquired by violence, hospitals and relatively recent graves.

Further, a close examination of documentation shows that most remains were obtained with a disregard for scientific rigour. They were dug up or collected from dissecting tables. They were selected because of their good preservation or peculiar pathologies of interest to anatomists. Other remains, in poorer condition, were discarded. Many more were subsequently discarded following destructive

²¹⁴ See para 43 of Appendix 3.

²¹⁵ Para 164.

anatomical investigative techniques. Thus, collections are highly biased in what they represent.

In the experiences of the National Museum of Australia, indigenous groups are increasingly interested in further scientific research after repatriation. The difference is, however, that they will have authority to approve, monitor and be informed of the outcomes, thus becoming partners and participants as opposed to subjects. Institutions that refuse to engage with indigenous people in their efforts to have ancestral remains returned are disregarding the opportunity to become relevant in the 21st century."

- The DH proposals contemplate that a withholding of consent will debar any research, regardless of its actual or potential medical benefit. The evidence we have received on scientific research by museums suggests that such research tends to focus on historical knowledge, rather than on contemporary medical applications.
- Consent should therefore be the starting principle for all museum holdings of human remains. In conformity with the approach of the DH towards future-acquired material, but subject to the qualifications that we have outlined, it should be the cardinal legitimising principle for the retention and treatment of existing holdings of human material by all museums: in lawyer's terms, a condition precedent. No material distinction should be drawn between classes of institution or between past and future holdings.

356. It appears proper to conclude the argument with the words of the independent legal adviser on the HRA, who has said:

'I welcome the general acceptance of the argument that the treatment of human remains in museums and similar institutions should be aligned with the treatment of human remains in the custody of hospitals under the DH's proposals. As you

know, I argued in my paper that discriminatory treatment between those in hospitals and those in museums could breach Article 14 of the European Convention on Human Rights. For these reasons I would be unhappy if the first of the alternative views (informed consent should not be paramount where there are no living relatives or genealogical descendants to give such consent) were to prevail.'

A rejoinder

357. These arguments have been considered by the minority and have attracted the following rejoinder:

Practicality

- There is substantial doubt whether the second option is practicable within large collections. Expanding a local overseas model of kinship or consent, which operates effectively for well-informed and organised indigenous groups within its own country, into a global model, which operates effectively beyond its home territory in alien political and legal conditions, may be perplexing and burdensome. One problem may be that some overseas groups lack the constitutional coherence or political direction of contemporary indigenous groups within the United States or 'Old Commonwealth'.²¹⁶ The evidence cited in Chapter 4 and elsewhere in this Report derives from groups whose circumstances allow them to present a coherent and representative position, but this will not always be the case. In any event, clear assurance procedures that are fair to all concerned will be needed to underpin the necessary enquiries as to whether there are parties whose consent is needed or who must be consulted. The identification

²¹⁶ Note from Dr John Mack: 'A museum might, for example, be able to identify particular remains as of Yoruba origin, but have no family or genealogical information about those remains. There are at least 20 million Yoruba in Nigeria. There is an overall sacred kingship invested in the Oni of Ife but his role would never have extended to such matters, any more than the Queen of the Maori has exercised authority in repatriation issues. In such cases as the Yoruba it is very difficult to see how the museum could identify a claimant group, or one with whom it could consult in any detail.'

of those procedures will be hard enough for the first option, but markedly more so for the second.

Resources

- Some museums receive a substantial volume of claims or requests from people whose beliefs about themselves and those whom they claim to represent impel them to require particular treatment of human remains. Such beliefs are ostensibly genuine but can be very hard to verify. It is arguably an improvident use of an institution's resources to investigate (either internally or before the Human Remains Advisory Panel) whether every such person has the right to be consulted about remains in a collection. The problem may be enhanced by the fact that closure with one group of representatives does not necessarily constitute closure with another. There are real complexities in determining an appropriate set of procedures. The process would need to be capable of summary application.

Lightening the load

358. In response to these concerns, we have emphasised in our Recommendations that the obligation on museums should be one of best endeavours in the circumstances, rather than one of absolute commitment. We also believe that it is fair and proper for museums to require some formal testimony as to the absence of relevant consent (both on the part of the deceased person and on that of any present claimants) and as to the necessary relationship of the claimants to the deceased person. Declarations to that effect by claimant groups, supported by material evidence, would clearly be a helpful starting-point, and one that museums might justifiably incorporate into their procedures. We also propose that a central and universally accessible system be established to enable museums to identify the principal points of contact and consultation within particular jurisdictions. We do not underrate the practical challenges which a test of consent will

pose to museums and fully accept the need for careful exploration and commitment at executive level.

359. With these considerations in mind, we proceed to examine the factual questions about consent that we raise at the beginning of this chapter. Of course, we do so without reference to any specific item in any particular museum collection, having recognised throughout that each case must turn on its facts. Our purpose is to show the operation of the principle of consent within particular factual contexts, and the likely direction of any common-sense analysis of this question.

Circumstances of departure: the second question

360. *Do English collections contain a significant number of human remains that were originally removed without the consent of (a) the deceased person and (b) those members of the deceased person's family or community who might reasonably have expected to be consulted about the removal?*

361. In our view the incontrovertible answer to this question is 'yes'. There is virtually no positive evidence to show that items of human material which entered the possession of museums or kindred institutions before 1948 did so with the consent of the deceased individuals, or their blood relations, or their spouses, or their communities, and much positive evidence to suggest the contrary. Families may have approved the relinquishment of the deceased's remains by burial or other funeral process (such as cremation or exposure to natural elements) but that alone is unlikely to justify inferring consent to any later removal or acquisition. In regard to second-stage removal, such as disinterment from a grave and relocation to a collection, evidence of relevant consent appears almost wholly lacking.

362. In some cases, of course, the question is shrouded in obscurity. There are several reasons for this evidential void:

- Many of the people whose remains are in museums died so long ago that family and community associations are untraceable. It is impossible to find anyone with the necessary standing to give or refuse consent. The longer the interval between death or burial and removal, the remoter the prospect that anyone will challenge the current retention or other treatment. In such circumstances, lack of original consent to the removal is probably immaterial, because there is no contemporary person or group aggrieved by it. The position may be otherwise, however, where the descendants or community who object to the present retention or other treatment can show a surviving and continuous link to the relevant group at the time of the removal.
- Some contemporary overseas groups or communities lack the constitutional unity or political direction of others.²¹⁷ Some groups may have been too heavily engaged by other challenges, or lacked the geographical or political integration, to formulate a policy or mount a challenge on this issue.
- Some removals (for example, those following recent excavations of ancient human remains from burial places within England and Wales) will have been conducted according to law. The observance of legal procedures may be regarded as overriding, or rendering immaterial, any wider issue of consent. Some removals may even have been a matter of indifference to surviving descendants or communities, making it reasonable to infer that they would not have objected, even if they had been consulted.

363. In other cases, however, the removal will have occurred in a manner directly contrary to the wishes of those who might reasonably and properly have been regarded as having a legitimate interest in the continued tranquillity of the remains.

²¹⁷ Para 357.

Contemporary consent: the third question

364. *Is such lack of original consent to be regarded purely as a historical fact, no longer contentious in the light of modern conditions, or should it be regarded as a continuing barrier to the retention and treatment of human remains within museums and other collections?*

365. Evidence presented to the Working Group and to the Parliamentary Select Committee on Culture, Media and Sport makes it plain that, for many people, want of original consent is not simply an academic issue.²¹⁸ To these people, the removal of human remains without consent was a moral wrong that demands correction. In some cases, it was offensive and uncivilised (perhaps even unlawful)²¹⁹ by the contemporary standards of the colonial authority or society, as well as by those of indigenous communities. Where communities, beliefs and memories survive, the sense of pain and injustice could be as poignant and corrosive today as on the day of removal. Such removals are seen not only as a wrong that demands to be redressed, but as a barrier to that repose and dignity which should be extended to all human remains from the particular community. To some, moreover, the consequences of this violation and lack of consent can be understood only against a wider background of deprivation and subordination of indigenous peoples, the reversal of which is still in progress. The recovery of human remains is therefore part of a broader movement towards the consolidation of identity and self-worth for indigenous peoples.

366. Viewed in this light, consent becomes an important question for reasons additional to the fact that it has been adopted as a cardinal principle by the DH in regard

218 'These are our ancestors. We need to put them to rest ... It is unconscionable that our ancestors have been placed in boxes on shelves, put on display in cases, handled and examined for research purposes, knowing that they remain in a state of unrest.' These are the words of the Chitimacha tribe of Louisiana, referring to the remains of two females from the tribe now held by the Natural History Museum in London. The statement was made to the House of Commons Select Committee on Culture, Media and Sport in 2000, and quoted in the Select Committee's Report *Cultural Property: Return and Illicit Trade* (2000) para 161.

219 See, for example, Paul Turnbull 'Indigenous Australian people, their defence of the dead and native title' in Fforde et al., *op. cit.* Chapter 5, especially at p 82, relating a case where an individual was fined by a criminal court for disinterring Aboriginal remains.

to the future acquisition and retention of human organs and tissue by medical institutions:

- First, the existence of an original wrong requires museums to ask themselves whether they consider it appropriate to derive a benefit from that wrong. If that is a relevant question to be asked of museums that possess material spoliated during the Nazi Holocaust, it may be no less material in our context (though we do not assert an exact parallel between the two situations).
- Secondly, the terms of reference of the Spoliation Advisory Panel²²⁰ require the Panel to take account of the circumstances in which a museum or gallery obtained the material in question. We recommend the establishment of a panel comparable to the Spoliation Advisory Panel, with similar terms of reference.²²¹ If the Minister accepts our proposal for a Human Remains Advisory Panel (Advisory Panel) on such terms, one matter for consideration by the Advisory Panel will be the circumstances in which the material in question was removed and acquired, and the extent to which the museum knew of those circumstances. It is therefore natural to look to the history of a particular acquisition, from the time of removal onwards, in judging the merits of its current possession.

367. All these arguments could benefit from further debate. Some argue that, given the distance of time and other factors, there may in many cases be no survivors with a sufficient interest in recovering human material, or in objecting to its further retention or treatment. This assertion is vigorously contested in other quarters, and can in any event be judged only on particular facts. Others might regard it as misguided to interpret the research done by museums as a benefit to museums, rather than as a benefit to humanity at large; this is no simple case of an institution seeking to retain the proceeds of wrongdoing. More generally, it might be objected that any redress of the wider injustices inflicted on indigenous peoples is beyond the Working Group's terms of reference and

²²⁰ These are set out in Appendix 7.

²²¹ Para 482 and Chapter 12, Recommendation V.

should be left out of account. In relation to the DH proposals, it might be said that these relate to the contemporary acquisition and retention of human material, and not to material acquired in the past. Finally, there may be those who distinguish the two cases of spoliation and human remains, pointing perhaps to the greater distance in time, and the narrower range of remedy acceptable to claimants, in the latter case.

368. We revisit some of these questions later. For the present, we offer two observations:

- First, we believe that some (perhaps all) of the foregoing issues cannot be answered in the abstract, divorced from the particular circumstances. They require the analysis of specific facts. Their resolution depends on a case-by-case approach and not upon some blanket solution.
- Secondly, we believe that some (perhaps all) of these issues are precisely the type of question that would benefit from being referred to an Advisory Panel, which can evaluate each claim on a case-by-case basis, paying regard to its specific context, in a detached and disinterested manner, and with the benefit of independent expert advice.

Removing the sting: the fourth question

369. *When, if at all, should circumstances arising after the original removal of an item of human remains be deemed to confer a consent which might otherwise be lacking, or justify the admitted absence of consent?*

370. Events which might be advanced as validating an originally unauthorised removal include a long period of inaction by a descendant group, or the terms of any transaction by which remains arrived in the museum.

Retrospective consent

371. In principle, there is no reason why a relevant person or group might not give retrospective consent to removal. Such consent should be taken into account provided it was plain, free and informed. One might envisage circumstances where families or communities openly acquiesced in the original removal of a deceased relation from the place of burial, or later and without pressure from dominant elements accepted compensation for a removal that was unauthorised at the time, or were induced by other means to withdraw an initial objection. More commonly, families or communities may simply have refrained from protest or other action, remaining silent in a manner which might be capable of being interpreted as implied consent.

372. We suggest, however, that on any realistic analysis the prospect of compelling evidence, showing any past ratification (express or implied) by communities of origin of an originally unauthorised removal, is remote, and will arise only rarely. Even where a removal provoked no immediate adverse reaction, or was opposed but was later compromised, circumstances may indicate that the response stemmed from inequality²²² and should not therefore be construed as decisive evidence of free and informed consent. Museums and other institutions should be alive to this possibility. They should endeavour to judge such silences and compromises in terms of history, as well as their own common sense.

373. There remains the possibility of *future* ratification or exoneration of past takings, perhaps as part of some wider agreement between museums and indigenous peoples. This might follow a formal repatriation of authority to indigenous peoples in the sense advocated by witnesses from Australia.²²³

222 Such as absence, or fear of the consequences of protest, or imperfect understanding, or preoccupation with some other issue, or some other form of vulnerability.

223 Para 134.

Acquiescence, silence and inaction

374. It is, of course, axiomatic that to be effective any relevant consent should be genuine, unequivocal, free and informed. Having regard to these criteria, museums may wish to be circumspect about any argument that long periods of silence or absence of protest, on the part of modern cultural descendants or communities of origin, denote retrospective consent.²²⁴

375. This may be one area in which legal models provide a useful guide to the solution of nonlegal problems. In the law of personal property, the mere failure to take action to assert one's title to chattels does not generally constitute an abandonment of title to them.²²⁵ In the law of contract, the mere failure to respond negatively to a proposal does not generally constitute a binding acceptance of that proposal.²²⁶ A different analysis might follow, however, where it was reasonable for an observer to conclude that the conduct in question did constitute a true acquiescence in the proposal or situation.²²⁷

376. The circumspection to which we refer may be further justified by reference to the circumstances. Museums might wish to look critically at the political, economic and other reasons for any silence or absence of protest, in order to test its authenticity as a potential source of consent.²²⁸ Museums might take the initiative to inquire positively into such reasons, through dialogue with the relevant community. Museums might also find it helpful to consider the response which medical authorities would extend to similar forms of potential consent.

224 Cole, *op. cit.* pp 174-176, 307 et seq. cites numerous cases of the collection of skulls in Canada by furtive and deceitful conduct, as part of a deliberate programme of averting indigenous opposition. Simpson, 1994 refers to the collector Andreas Reischek's having to conceal his theft of Maori mummies 'for discovery might have cost me my life'.

225 Anthony Hudson, 'Abandonment', in Norman Palmer and Ewan McKendrick, eds., *Interests in Goods* (London: 2nd edn., 1998) Sweet & Maxwell, pp 595-619.

226 Sir Guenter Treitel QC, DCL, FBA, *Law of Contract* (London: 11th ed., 2003) Sweet & Maxwell, p 32.

227 *Ibid.* pp 33-34.

228 Note from Dr Laura Peers: Indigenous groups in Canada, Australia and New Zealand, working with very limited resources, have nevertheless contacted museums and other holding institutions nearest to them, and are now turning to museums abroad to deal with ancestral remains held outside their home countries. Silence in the past does not therefore mean that silence will continue; nor does it mean lack of concern. See further Turnbull, *op. cit.*, especially pp 81-82.

377. A similarly critical approach might properly apply to questions of original consent on the part of those families or communities who vacated possession of human remains. A formal or apparent consent should be evaluated in terms of the ascertainable conditions prevailing at the time possession was vacated. Such evaluation might suggest that an apparent consent was vitiated by colonial dynamics of power or equivalent factors. To be sensitive to these matters need not entail the abandonment of robust common sense.

Legitimate acquisition

378. Some museums contend that their acquisition of human remains was proper and correct. Such a claim requires analysis. We do not understand it to mean that the material was acquired with the full consent of blood relations, spouses or communities of origin. Rather, we construe it as meaning that the museum's acquisition (which may, of course, have occurred long after the original removal) complied with contemporary ethical and legal standards and with general principles of good faith.

379. We accept that an acquisition under such conditions may have been immune from legal sanction and could even have conferred ownership on the museum, in so far as anyone can own human remains.²²⁹ We also accept that compliance with ethical and professional standards contemporary with acquisition may be an important factor in the deliberations of the proposed Advisory Panel. But we believe that such procedural regularity cannot, as a matter of logic, either constitute or take the place of consent.

380. We are reminded in this context of the words of the Tasmanian Aboriginal Centre:

Nor is the argument of legitimate acquisition sound. This is just hiding behind a technicality in the case of Tasmanian material. It may have been donated to you

²²⁹ See Chapter 6.

or purchased by you on your side of the ocean, but on our side it was plundered, stolen and taken by deceit from powerless people preyed on at their most vulnerable time. It was not you [i.e. museums] that did it but you still have the spoils and they were not properly acquired.²³⁰

Scientific benefit

381. Nor do we believe that the benefits which such institutions have derived or conferred from their possession of human remains operate to supply an otherwise absent consent. Consent is either present or absent. To accept this logical premise is not to decry the value of research, but merely to place it in context. The choice lies between abrogating the principle of consent in specific cases, or accepting that consent cannot be compromised or displaced by proof of collateral benefits.

Culturally isolated remains

382. There are cases where no living person or community raises a claim in respect of the remains, but where much is known about the beliefs of the society to which deceased person belonged.²³¹ We know, for instance, that the ancient Egyptians would have disapproved strongly of the opening up and investigation of mummies. The question therefore arises as to whether, and to what extent, museums owe a responsibility to respect the views of original individuals and communities, irrespective of the absence of any contemporary concern by living persons or extant groups.

230 Tasmanian Aboriginal Centre, 'Free exchange or a captive culture? The Tasmanian Aboriginal perspective on museums and repatriation', paper delivered at the Museums Association Seminar on Museums and Repatriation, 4 November 1997, London. This paper also contains examples of requests made by the Centre to institutions in mainland Europe for the return of human remains.

231 For instance, Egyptian mummies, or prehistoric skeletons recovered from excavations.

383. Such an approach would imperil much excavation involving human remains, and would in our view carry the principle of consent too far. Clearly, all human remains, whatever their age, must be accorded respect. But, even in England, where the wishes of a deceased person are generally respected, such respect is not (and never has been) indefinite in its duration or universal in its application. The crucial consideration, we believe, is whether there are living people or communities who (a) assert particular demands about the treatment of the deceased person and (b) can demonstrate a sound and compelling line of authority (for example, through some familial, genealogical or cultural relationship)²³² for making those demands. The nature of that necessary standing has been discussed elsewhere.²³³ A mere lack of consent on the part of the deceased person would not be determinative.

384. We accept that there may be exceptional circumstances where fundamental dictates of conscience and decency compel the reinterment or other relinquishment of human remains even in the absence of any current claimant or advocate for their return. Such a situation may arise where the removal of a body constituted a gross violation of legal or ethical propriety, or where the deceased person belonged to a culture which recognises independent rights in the deceased person as well as (or rather than) rights in the living on behalf of the dead. In realistic terms, we envisage that these exceptional circumstances are likely to prove decisive only in cases of relatively recent removals without the consent of the deceased.

Unclaimed remains: the fifth question

385. *Where consent is not an issue, should the current holder enjoy unfettered liberty to deal with human remains, subject only to existing law?*

²³² For the relevant tests, see paras 333-349.

²³³ Paras 340 et. seq.

386. We believe that further constraints on the custody and treatment of human remains are justified under modern conditions and that such constraints are already (in the main) being observed by museums. As we observe elsewhere,²³⁴ all human remains must be treated with respect and dignity, regardless of whether they are the subject of any claim or other controversy. We propose that standards be formalised and enforced through the medium of a new regulatory authority and a Code of Practice sanctioned and monitored by that authority. In the case of unclaimed overseas indigenous remains, we recommend that the Code should call on museums to consult any governmental or governmentally-appointed agency known to the museum which is charged with the intermediate reception and stewardship of such remains within the relevant overseas country, with a view to determining whether to relinquish the remains to that entity.

Other considerations

387. We recognise that there is an element of speculation in applying questions of consent to ancient removals, and that museums will be fully justified in adopting a common-sense approach in marginal cases, or in situations where firm evidence is lacking. At the same time, we consider it useful to bear in mind that consent need not be the only factor to determine the ethical treatment of human remains. There may, for example, be cases where local communities traded the remains of their members, either to ingratiate themselves with the acquirers or as a simple self-interested act of commerce. One response may be to examine carefully the reality of the apparent consent and its possible origin in indigenous privation or fears of dominance or other adverse consequences. Another may be to treat the absence of consent on the part of the victim as paramount, unrelieved by any consent on the part of his or her compatriots.²³⁵ But a third approach may be to put aside the question of consent and to apply other ethical considerations to this question. Such an approach may take account not only of the circumstances of removal but the present feelings of the descendant community, the

234 Para 412.

235 We express elsewhere certain reservations about an unqualified adherence to this approach: paras 382-383.

museum's perception of its own role and responsibilities in the light of changing social and professional values, and the prospect that particular responses might offer a constructive medium for future cultural exchange. There is nothing in our Recommendations that need inhibit a museum from adopting such a position.

Chapter 8: Associated objects

General

388. Our terms of reference require us to consider ‘associated objects’ in addition to human remains. The clear inference is that the association implicit in this phrase must be with human remains, as in the case of grave deposits. Beyond that we were given no definition of such objects and we have regarded ourselves as free, within ordinary limits, to define our own terms.

Identification: what are associated objects?

389. Neither the existing legal instruments, nor the submissions made to us, cast substantial light on this question. The Native American Graves Protection and Repatriation Act 1990 (US)²³⁶ does, however, employ a concept of ‘associated funerary objects’ which are defined as:

objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later, and both the human remains and the associated funerary objects are presently in the possession or control of the Federal agency or museum, except that other items exclusively made for burial purposes or to contain human remains shall be considered as associated funerary objects.²³⁷

390. This appears to be a narrower concept than associated objects in general. It is moreover to be understood in conjunction with ‘unassociated funerary objects’ which are equivalent objects *not* in the possession or control of the Federal agency or museum. Even so we derived some guidance from the quoted provision.

²³⁶ See para 224.

²³⁷ Native American Graves Protection and Repatriation Act 1990 (US), s 2(3)(A).

391. Of those who made oral submissions to us, the only group to touch substantially on this question was the Aboriginal and Torres Strait Islander Commission (ATSIC), whose representatives replied to our inquiry by stating that the corporeal records or other tangible products of research into human remains should be included in any reforms directed at claims and returns. ATSIC also helpfully indicated that they were prepared to regard human remains as a ‘tight box issue’ and to put aside more general observations on the prospective return of other sacred or culturally-meaningful objects.²³⁸

392. For the purposes of our inquiry, the Chairman provisionally formulated (though we did not formally agree) a working definition which characterised ‘associated objects’ as consisting of signifying those tangible, material and corporeal objects which:

- are currently held by a museum as part of its collection; and
- were, or can reasonably be assumed to have been:

(a) deposited in some place other than the museum in connection with the burial of a relevant person, as part of a recognised burial process relating to that person, contemporaneously with or subsequently to, and in the same place as, the burial; or

b) held by a relevant person at the time of that person’s death, (either individually or communally with any community to which the relevant person belonged at the time of his/her death), as the property of that person or community, by reason of any applicable law or custom; or

(c) derived from the remains of a relevant person, whether in the form of tangible artefacts or of material developed or retained for research or of records or other species of tangibly embodied intellectual property.

²³⁸ For further submissions, see para 121.

393. A ‘relevant person’ would, for this purpose, be any deceased person whose remains are currently held by a museum as part of its collection. It was recognised that categories (b) and (c) might benefit from further consideration.

Treatment

394. As we examined this formulation, five things became clear:

The definition of associated objects was contentious and required specialist advice (particularly, but not solely, in the field of intellectual property derived from human remains).

- Different forms of associated object might well require different treatment.
- Associated objects, being artefacts, were more likely to have become the property of an acquiring museum than human remains, even where their original removal was unlawful.²³⁹
- Whatever their definition associated objects and objects of sacred significance were more likely to give rise to questions of human rights than other cultural objects.
- It would be more constructive to consider objects associated with human remains (whatever their exact definition) alongside sacred objects in general.

²³⁹ An unlawfully-removed funerary object might, for example, have been the subject of a later acquisition in good faith while located in an overseas country, the law of which country recognises such an acquisition as conferring a good title on the acquirer and usurping that of the original owner(s): see generally *Winkworth v Christie Manson & Woods Ltd* [1980] Ch 496; Norman Palmer, ed., *The Recovery of Stolen Art* (1998) London: Kluwer Chapter 1. Alternatively, the applicable limitation period for recovery of the object might have expired: see Ruth Redmond-Cooper in Norman Palmer, *Museums and the Holocaust: Law, Principles and Practice* (2000) Leicester: Institute of Art and Law, pp 71-82.

395. We were fortified in our approach by the consideration that Article 6.6 of the ICOM Code 2001 imposes the same responsibilities in respect of both human remains and ‘material of sacred significance’,²⁴⁰ and by advice from our specialist adviser on human rights that artefacts of religious or cultural significance might raise similar (but by no means identical) human rights questions as human remains. In the words of our adviser:

Where an artefact is of significant importance to the culture or the religious beliefs of an indigenous people then arguably the continued retention of such an artefact by a museum could amount to a denial of such peoples’ right to maintain their culture or to manifest their religion, thus engaging Articles 8 and 9 of the Convention [the European Convention on Human Rights]. Were a museum to adopt a discriminatory policy and return some artefacts and not others then a breach of Article 14 might also arise. Where it is claimed that the retention of an artefact would breach a Convention right, it would be for the museum to justify the retention of such artefact using the arguments of public interest, proportionality etc discussed earlier in this paper. A further significant factor is that, unlike the case of human remains, in most cases the museum would be the legal owner of the artefact. This factor would be an important, if not determining, factor when deciding where the balance of interest lies between the competing interests of an indigenous people and those of the museum. Each case would have to be judged on its merits but there would have to be very compelling reasons for the return of the artefact to prevail over the museum’s proprietary rights. In the event that the artefact were returned, then in order to avoid breaching the Article 1, Protocol 1 rights of the museum, compensation is likely to be payable to the museum.²⁴¹

²⁴⁰ See Chapter 5, paras 179–180. See also Canada Parks Management Directives 2.3.1, *Human Remains, Cemeteries and Burial Grounds* (2000), and 2.3.4, *Repatriation of Moveable Cultural Resources of Aboriginal Affiliation* (2000), paras 2.0 and 3.0 of which treat separately the three categories of human remains, sacred objects and ‘other moveable cultural resources’.

²⁴¹ See Appendix 3, para 52.

Conclusion

396. Having regard to these matters, we propose the establishment of a further Ministerial Advisory Group to make recommendations on sacred objects and objects of religious or spiritual significance. The terms of reference of this Group should include objects associated with human remains, and might also apply to artefacts comprised partially, but not wholly or largely, of human remains, which we exempt from our current proposals.²⁴² The Group should have a constitution similar to the Working Group on Human Remains and a specific remit to consider the relaxation of museum governing statutes that impose a prohibition on disposal of relevant material.

397. In making this Recommendation we entertain no illusion about the ease with which a definition of sacred objects can be formulated and agreed, or about the magnitude of the questions confronting any cross-cultural advisory group of the sort we propose. Such considerations fortify our belief that such a group must be supported by expertise of the highest order, particularly in the fields of ethnography and anthropology.

398. We propose that during the intervening period museums should continue to apply existing repatriation guidelines in this sphere and that associated objects should not be subject to the proposed regulatory authority.²⁴³

²⁴² See Chapter 1.

²⁴³ For the existing guidelines see paras 161-184. For an earlier example of the return of a sacred object, see the return of the Lakota Ghost Dance Shirt from Glasgow, para 209.

Chapter 9: Ethics, principles and obligations

The factors affecting museums

399. A museum which holds human remains must discharge, and where necessary reconcile, many responsibilities. It must comply with its legal obligations, the precepts imposed by ethical guidelines and codes, its scientific mandate or mission, and the controls imposed by its economic, political and constitutional status.²⁴⁴ In their codes of ethics, museums also recognise a general responsibility to reflect society and public opinion, to promote public education and to preserve and research the material evidence of the past. These responsibilities may entail standards of social decency, even-handedness and good conscience, as well as more formal duties of scholarly enquiry and public enlightenment.

400. In any given situation, any one or more of these responsibilities may predominate. A museum that is underfunded cannot fulfil its other commitments. A museum that is legally prohibited from a course of action must refrain from it regardless of prejudice to other tasks or benefits. A museum that acts in a manner unacceptable to the public may become unable to discharge some other mandate, however noble. Some conflicting objectives can be squared by compromise. Others may be overriding, incapable of negotiation, requiring that others defer to them.

401. Among these diverse and fundamental responsibilities, two have given rise to particular tension within our field and call for particular resolution. Both have been expressed to us as fundamental responsibilities which need to be evaluated relatively in particular cases. They are:

²⁴⁴ Such status may characterise museums as public authorities in receipt of public funds, or as charities enjoying fiscal privileges, or as commercial organisations accountable to paying consumers, or all three.

- respect for the diversity of beliefs about the importance of the remains of ancestors, and the way in which they should be treated; and
- respect for the scientific value of human remains, for the spirit of scientific inquiry which leads institutions to hold and care for remains, and for the benefits which such inquiry may produce for humanity.

Evaluating the factors

402. We recognise, of course, that cultural value systems vary. The values and assumptions of Western communities are not universal and differ profoundly from those of other (including claimant) communities.

403. Museums, scientific researchers, genealogical and cultural descendants, the concerned public and others have beliefs about the proper and respectful treatment of human remains. These may differ significantly owing to cultural background and the different experiences of populations across history. Respect for these different positions, a desire to understand them and their underlying cultural meanings, and a sincere commitment to working together to ensure that the right decision is made about the future of human remains, must be at the heart of interactions among these parties.

404. We need to remember the circumstances in which many human remains were collected. Collecting was often accompanied by a lack of respect and sometimes by outright criminality.²⁴⁵ Many communities continue to regard such events as an outrage and we understand their reasons.

²⁴⁵ See Chapters 3 and 7.

Openness and transparency

405. Absolute transparency is essential in order to enable all interested parties to know where they stand. Such transparency should extend to the nature of human remains collections, the circumstances of their acquisition, the nature of research done on them, the findings of such research, and the holding institution's position on restitution claims. Subject to appropriate consultation, and to the proper observance of standards of respect, decency and confidentiality, the collections themselves should also be accessible: both to scientific inquirers and to genealogical and cultural descendants, including potential claimants. We regard it as critical that nobody with a legitimate interest should be excluded and that nothing should be hidden that can be legitimately divulged.

Relationship of claimants to the deceased person

406. We have considered whether, and on what basis, one can rationally distinguish the relative strength of claims by different interested parties. Our conclusions are set out in Chapter 7. Broadly, we hold that account should be taken of the wishes of the deceased person, of his or her relatives, genealogical descendants and wider social family, of the source community and cultural descendants of the deceased where still existent, and of representatives of the country of origin where exact provenance cannot be established.²⁴⁶ A majority of the Working Group believes that, where a given person or group has within its culture or belief system a status or responsibility comparable to that which UK institutions would recognise as conferring authority to withhold consent, the informed consent of that person or group should be a precondition of any future act or omission in relation to the human remains, and this condition will be overriding.

²⁴⁶ As we note, there is also a time dimension: for ancient remains (i.e. those dating from before 1500), claims are generally based on cultural affiliation; for more recent remains, links can be genealogical or again based on cultural affiliation. We believe it is reasonable to take some account of the age of remains when considering claims, though we need to bear in mind that time itself is understood differently by different communities. As also noted in Chapters 1 and 7, we have not included human fossils and sub-fossils within our consideration of human remains.

The Retained Organs Commission and the Department of Health proposals

407. The Retained Organs Commission currently oversees post-1947 human organs which are retained for medical purposes after death, though its mandate will cease in 2004. There are many points of contact between the ethical issues raised in that context and those raised in the context of claims for the return of human remains. We consider it important that there should be substantial consistency of approach between the two areas. In 2002, the Chief Medical Officer proposed, and the Department of Health (DH) circulated for consultation, a set of guiding principles designed to underpin the retention and use of organs that are acquired in future by medical institutions.²⁴⁷ We believe that in essence these principles²⁴⁸ apply equally to museums and similar institutions, even though museums are concerned with existing collections (rather than future acquisitions) of human remains. The principles are:

- respect (for people who have died and their families);
- understanding (that love and feelings of responsibility remain after death);
- informed consent (enabling fully informed choices to be made);
- time and space (to consider what decisions to make);
- skill and sensitivity (in dealing with those close to a patient or deceased person);
- information (to improve understanding and decision-making);

²⁴⁷ Department of Health, *Human Bodies, Human Choices: The Law on Human Organs and Tissue in England and Wales – A Consultation Report* (2002).

²⁴⁸ Which have been substantially endorsed in a later Department of Health explanatory document: para 198 et seq.

- cultural competence (ensuring that different attitudes to post-mortems, burial and use of organs and tissue are recognised); and
- a ‘gift’ relationship (shifting the emphasis from organ retention to organ donation).²⁴⁹

408. We make particular mention of consent, in relation to which the DH has recently said as follows:

Consent is expected to be the foundation for the lawful taking, storage and use of all tissue, including whole or part organs. This is based on the principle that, in general, a person should be able to determine what happens to his/her body or to any of its parts. Established conditions for obtaining valid consent from a person would be implicit. These conditions include providing sufficient information, in a form the person could understand, and consent to be given voluntarily, not under duress nor undue influence from health or other professionals, family or friends.²⁵⁰

409. We believe that, in common with the retention and treatment of human remains by institutions within the competence of the DH, the retention and treatment of human remains by museums and kindred holders should be based on consent. In Chapter 7 we propounded tests for identifying the person or community whose consent should be sought in a particular case, and we examined the interrelation between the principle of consent and that of cultural competence.

²⁴⁹ Department of Health, *Human Bodies, Human Choices: The Law on Human Organs and Tissue in England and Wales – A Consultation Report* (2002).

²⁵⁰ Department of Health *Proposals for new legislation on human organs and tissue* (September 2003) p 3 para 191 et seq.

Statement of principles

410. We believe it would be helpful to all concerned to have a further statement of principles which, while incorporating the essential features of the DH consultative document, would also be specific to the museum context. In particular, these principles would provide guidance to the proposed Human Remains Advisory Panel²⁵¹ and to all those responsible for decisions about the future of human remains.

411. We suggest the following:

(i) **Unique status.** Human remains, irrespective of age, provenance or kind, occupy a unique category, distinct from all other museum objects. There is a qualitative distinction between human remains and artefacts. Human remains require special consideration and treatment.

(ii) **Respect and reverence.** Human remains must always be treated with respect. Responsibility for them should be regarded as a privilege. Museums owe the highest standards of care to bodies and parts of bodies within their collections, regardless of their age, origin, or the circumstances of their arrival in the collection.

(iii) **Full evaluation.** Where claims are made regarding human remains, a proper response requires the respondent museum to evaluate all relevant factors appropriate to its status and responsibilities. This may, according to circumstance, involve striking a balance between the concerns of a particular claimant group and the pursuit of scientific inquiry. It may also require the museum to seek to assess and consult any wider interests of humankind and to consider whether those interests are themselves best served by release or retention. A process should be

251 See Chapter 11.

established which enables decision-makers to review all relevant considerations and give all factors their due weight.

(iv) **External reference.** The proper treatment, care and destination of human remains are in the first instance for individual museums to determine, in the light of all the evidence available. A wide range of expert external advice should be sought and taken into account. Museums should be prepared to submit their position to external evaluation. Decisions should be taken on a case-by-case basis, though with appropriate regard for consistency and precedent, and should be based on transparency and dialogue.

(v) **Consensus.** Consensus should be the aim wherever possible. This may entail the involvement of an independent mediator, who enjoys the confidence of all parties.

(vi) **Cultural competence.** Museums and other relevant agencies should manifest a cardinal concern, throughout the process of responding to requests for the return of human remains, for feelings of loss and deprivation on the part of bereaved persons and communities, for the status and responsibilities of claimants within their own community or culture, and for cultural obligations and beliefs regarding the proper and respectful disposition of the dead.

Institutions must recognise, and reflect this recognition in both policy and practice, that feelings of bereavement and responsibility pass within some cultures to each new generation of descendants, and that some communities remain outraged and distressed at the manner in which human remains were removed and handled. Institutions should be sensitive to the attitudes of different communities to funeral practices, and to the care and treatment of human remains.

(vii) **Consent.** The underpinning principle shall be one of consent. Factors to be taken into account in responding to requests for return or special treatment shall include, but may not be limited to:

- the express wishes of the deceased person, if known;
- the wishes of genealogical descendants, and wider social families, if known;
- the wishes of the cultural community of origin, if still in existence; and
- the wishes of representatives of the country of origin, if exact provenance cannot be established.

In assessing these and other factors, it may be reasonable to take into account the age of the particular remains in question and, in cases where the consent of a party other than the museum is not an overriding consideration, the importance of the remains for medical and scientific research and education.

(viii) **Authority.** In negotiating the treatment, care or return of human remains, institutions should in principle deal with the community of origin for the particular remains. Where institutions are invited to deal with groups that claim to represent particular communities, rather than with the communities themselves, they must ensure that such groups have conducted substantial and effective dialogue with the community of origin and can establish a proper mandate from it.

(ix) **Sympathy and sensitivity.** Institutions should always use their best endeavours to show sympathy and sensitivity in dealing with the genealogical or cultural descendants of the deceased person. Procedures for considering claims should allow claimants adequate time and space in which to make what will sometimes be difficult decisions. Institutions should ensure that they have access

to the expertise necessary to manage the complex and sensitive process involved in considering claims.

(x) **Candour and communication.** Full information should always be provided to those involved in claims, requests and controversies concerning human remains, in order to improve understanding, to create so far as possible an equal relationship in the approach to decisions, and to enable fully informed decisions to be made. Such provision should, however, pay full regard to considerations of secrecy and confidence affecting human remains, and should not involve any disclosure of secret/sacred information or any other material received in confidence unless compelled by law.

(xi) **Rationality.** Decisions regarding human remains should be fully reasoned and manifest a rational and respectful evaluation of arguments made both by claimant groups and by those who may oppose such claims. These reasons should be published, subject to appropriate restraints.

Chapter 10: The problems requiring solution²⁵²

Introduction

412. This chapter recapitulates those aspects of law and practice that need improvement. It draws on evidence presented to the Working Group and the researches of individual members. The Working Group's solutions are set out in Chapter 12, although we anticipate some of them here.

413. The Working Group does not allocate responsibility for the defects of the present system or believe that it is universally deficient. But the Working Group does believe that it can and should be improved, and that improvement can be efficiently accomplished.²⁵³ Not least, it feels that the principal controversies in this field will not diminish or disappear unless something is done.

History

414. Many human remains were obtained without consent in circumstances of barbarity and oppression. While it is not contended that particular museums were the perpetrators of these wrongs, they are, to some degree at least, the beneficiaries. This leaves them with the challenge of reconciling their present tenure with the repudiation of past injustice. It also exposes them to a possible argument based on notions of unjust enrichment: that they would not, however innocent, wish to profit from original wrongdoing.

²⁵² We recognise that much of the material presented in this chapter appears, in various guises, elsewhere in this Report. We have adhered to presentation in the current form, however, because we believe that it may assist readers to have the relevant issues collected in a single and largely free-standing document. ²⁵³ Below national level, we have detected no substantial pressure for change from museums. This may be because most museums probably have the power to make any necessary change independently, without external intervention. Even so, we detect an inclination not only towards a greater discretionary power across the museum community but towards clearer guidance for holding institutions.

415. Museums may also feel vulnerable on the grounds that they did not make full inquiry about the legitimacy of origin of remains when they acquired them, or ignored plain evidence of injustice, or have shown no impulse to correct acquisitions that would not be made today, and by such inaction have passively condoned wrongdoing.

416. Museums may argue, in turn, that certain overseas indigenous people collaborated in the collection of human material, or that claimant groups gave retrospective consent to their tenure by acquiescence or inaction over a long period. Such attitudes may revive rather than relieve controversy.

417. There are arguments for looking forwards and not backwards, and much can be gained from a neutral and independent forum to consider claims and construct future relationships.

418. But past events are relevant for at least two reasons. First, the need for closure may depend on an acknowledgement of, and atonement for, past injustice. Secondly, the history of an acquisition may determine whether there is consent to the modern tenure of human remains.

419. To ignore the latter question is to invite comparisons. Why is consent less important here than in other contexts, such as the tenure of human tissue by medical laboratories? Does distance in time or space confer immunity?

Deprivation and mistrust

420. There is substantial evidence that communities are grieving because they cannot lay their ancestors to rest. Where this inability stems from retention by a museum, resentment and disaffection are the inevitable result.

421. Feelings of injustice and exploitation are of course harmful to the immediate relationship between a museum and a claimant group. They can frustrate the development

of culturally beneficial relationships between museums and claimants. They can also cause friction between nation states, or among museums that favour different policies, or between museums and their consumers.

422. Such feelings can also hinder the tackling of other social or cultural problems, to which resolution of the issue of human remains is seen as a prelude.

423. Frustration with the present position can also lead to divisive attempts at resolution. Examples might be the taking of legal action, or the conduct of media campaigns, or other adversarial action. Claimants have so far been moderate and have avoided extreme reactions, but the situation could change.

Information

424. Until this Report, there has been no comprehensive survey of human remains in English museums, and no single source of information about such holdings. The Working Group's own survey, while revealing much of value, has shown that records and analysis are incomplete.

425. Two problems are apparent. First, some museums do not know exactly what they have in their collections. Secondly, some museums have not made publicly available the information they do have.²⁵⁴

426. The situation causes difficulty for inquirers and institutions alike. Claimant groups may feel that potentially important information is being withheld or that insufficient priority is being given to their concerns. Museums cannot respond fully or accurately to inquiries about holdings and may be concerned about volunteering

²⁵⁴ The Freedom of Information Act 2000 offers a partial answer to the problem but cannot be seen as a general solution. We have no clear information as to the extent to which it has influenced museums.

information that is later exposed as inaccurate, or giving the impression of a lack of candour. The result may be embarrassment and mistrust.²⁵⁵

427. The problem of access to information owes more to lack of resources than to indifference by museums. The Working Group understands that some claimant groups recognise this. Lack of resources might nevertheless lead museums to take refuge in defensive action, and induce them to minimise the time spent on this question.

428. This may be particularly so where a museum feels restrained by its governing statute from returning human remains in any event. In that case it might question the point of detailing its collection for the benefit of potential claimants when the result can make no difference to the outcome of claims.

429. Some museums have conducted extensive and enlightening research on particular classes of holding. An example is the Natural History Museum's audit of Australian Aboriginal remains. But these initiatives are exceptional and accentuate the general lack of information.

Repetition and circularity

430. In some cases the same claim has been restated in much the same terms over a period and has attracted much the same response. Exchanges have been fairly perfunctory and without any progressive dialogue. There has been little consideration of counter-arguments and the controversy gives every impression of going nowhere, least of all towards a definitive resolution.

²⁵⁵ On occasions museums have rediscovered material that they forgot. A recent example occurred earlier this year at the University of Melbourne, where Aboriginal remains forming part of the Berry collection were found in a locked room where they had been placed over ten years earlier, with the intention that they should be delivered to the Melbourne Museum for identification and repatriation. According to a spokeswoman 'People died, others went on leave and the momentum for their return was lost': *The Sunday Age* (Melbourne), 16 February 2003.

431. This is particularly so (and particularly understandable) where the museum regards itself as legally constrained from releasing objects. In a sense the museum has no choice. But whatever its logical foundation, this situation does not encourage constructive and decisive solutions or good future relations.

432. This suggests the need for some tie-breaking mechanism that gives both sides a chance to be independently heard, encourages them to develop and respond to new arguments, and offers a resolution that they can regard as relatively decisive.

Diversity of practice

433. Individual museums have done much to identify and measure their holdings, to manage them in accordance with best practice, and to devise policies for responding to claims.

434. Collective and representative organisations (for example, the Museums Association and Resource) have also worked hard to provide frameworks for solutions.

435. In consequence, the general rate of returns from museums appears to have increased, and the desire for principled solutions (whether positive or negative to claimants) appears more manifest. But this brings problems in its wake.

436. One concern is that this is uncharted territory. Existing guidance tends to be expressed as abstract principle rather than as concrete practical examples.

437. Another concern is that of apparent inconsistency, whether in general policy or in *ad hoc* treatment. The exercise of individual discretion will vary from museum to museum. Practice will vary markedly between those museums that have statutory constraints on disposal (and virtually no discretion) and those that are largely unfettered in this regard.

438. It follows that individual museum responses, while helpful in their immediate context, can themselves become a source of contention, and that worthwhile potential initiatives may be restrained by the fear of setting a precedent.

439. Exposure to a charge of inconsistency may occur not only among those museums or related institutions that hold human remains. A similar charge might emerge when such museums are compared with other institutions that hold human remains (such as hospital authorities) and with museums that hold artefacts other than human remains.

440. These risks might be lessened by a mechanism that refers claims and other controversies to an independent advisory group, which will evaluate the arguments and carry the burden of making recommendations. Such a group might deflect from museums some of the discontentment that currently attaches to them. The responsibility will shift, and with it much of the criticism.

441. A group of this nature might also in the long run save time and management costs.

Conciliation

442. The Working Group has listened to a variety of positions. Almost everything it has heard has been credible and reasonable. In no instance have its members detected cynicism, insincerity or venal self-interest. Individual members of the Working Group may find particular arguments more or less persuasive, but the Working Group is united in thinking that they merit respect.

443. The present concern is to investigate whether those positions are reconcilable and to ensure that each side is given due weight. That can be hard to achieve in adversarial conditions. Part of the Working Group's mission is to see that such conditions yield to greater understanding and that arguments be exposed to independent scrutiny.

444. Scientists do outstanding work with human material and it would a great loss if that work were compelled to cease. Most of it is totally inoffensive to other people and is conducted under strict ethical controls.

445. Claimant groups have the most intimate and profound reasons for wishing to place members of their family and community at rest and to save them from degrading and discriminatory treatment. They see the return of deceased people to their land as a sacred duty. They grieve for their ancestors and will do so for as long as this matter remains unresolved.

446. A reasonable person might think that a total subordination of one view to the other would be tragic and misguided, and that conciliation must be possible. It would be a serious failure if the fullest effort were not made to ensure that each element in the situation is balanced against the others. Another reasonable observer might think that the scope for compromise is so limited that ultimately an all-or-nothing decision is inevitable. If that is the case, the Working Group accepts that one day the nettle must be grasped. But such a conclusion may not be inevitable.

447. The Working Group believes that increased effort should be invested in the educational aspect of claims and retentions, in the aims and benefits of individual positions, in the concurrent development of non-contentious forms of resolution, and in the unrelenting exploration of common ground.

Regulation

448. To most societies human remains have a unique sanctity and status. They require distinctive standards of honour, dignity and respect.

449. The Working Group believes that the observance of these standards is important enough to attract public sanction. Those who hold and handle human remains should be publicly accountable for their tenure.

450. At present there is no single overarching authority to oversee the holdings of human remains in museums. There is also no obligation to match the tenure and treatment of human remains by museums with that by other institutions such as hospital authorities, even where common standards are appropriate.

451. The Working Group believes that the position in regard to holders other than museums is likely to change for the better with the creation of the proposed Human Tissue Authority. It recommends that museums be assimilated within this overall scheme.

452. The Working Group believes that this proposal will assist and streamline the public supervision of museum holdings of human remains. It should also avoid arbitrary inconsistency between museums and other holding authorities, and validate museum responses in particular cases where the advice of an independent panel has been observed.

453. The supervision of museums by the new authority may also justify the extension to museums of certain concepts acknowledged as applicable to other holding institutions, such as the preeminent accent on consent as the basis of all tenure and treatment of human remains.

Dispute resolution

454. Apart from the courts, there is no neutral and objective forum within which positions can be expressed and concerns voiced.

455. Court action is best avoided, for a multitude of reasons. But the lack of any better forum may encourage parties to keep alive the prospect of litigation, and to threaten it as a means of extracting concessions.

456. The prospect that matters may eventually come to court may put people on the defensive, and deter them from expressing their arguments candidly in less formal contexts. This stifles dialogue and hinders progress.

457. The lack of a viable neutral forum, particularly when combined with a museum statute that forbids disposal of human remains, can leave a museum with no option but to defend the claim and seek to rebut the claimants as efficiently as possible. Petitioners may mistrust the decision on the ground that the museum has an interest in the outcome, while the museum may feel that its values are being maligned and its position misunderstood.

458. These problems can be exacerbated by cultural vocabulary. The same words used by different parties can denote different concepts, leading to misunderstanding and alienation. An independent filter would provide a way of translating and reconciling those concepts.

Law

459. There is reason to believe that modern legal developments are not being fully monitored or understood. An example is the Human Rights Act 1998. Museums need more help if they are to track important legal changes and relate them to their work.

460. The laws that govern individual holding institutions, and dictate their freedom of action, vary from museum to museum, and yet with no particular policy reason for the divergence.

461. National museums are traditionally thought to be unable to dispose of human remains by unilateral act, even if they want to. This raises hard questions of interpretation and can expose museums to embarrassment. An example is the question whether a

statutory power to release objects that are unfit to be retained extends to material in regard to which there is a strong moral case for return.²⁵⁶

462. Those statutory mechanisms that enable a museum to gain authority for the release of material from outside agencies (for example those available under the Charities Act 1993 and the Regulatory Reform Act 2001)²⁵⁷ are uncertain in effect and can be random in application. They do not offer a constructive general solution.

463. It is unclear whether museums own human remains within their collections. The general rule that there can be no property in a corpse suggests that museum tenure of human remains is unaccompanied by legal ownership or possession. This can cause serious difficulty in the interpretation of individual museum statutes, in the transacting of loans of human material and in other fields of activity. It makes no constructive contribution to the debate over return of human remains.

464. Debates about the ownership and possession of human remains can in any event cloud the paramount consideration in relation to human remains, which is the necessity to ensure that they are treated in a manner acceptable to all legitimate public and private interests, and that such treatment is expressed through appropriate rights, responsibilities and regulatory mechanisms.

465. The foregoing factors make litigation for the return of human remains a hazardous enterprise for all parties. And yet the lack of a proper forum arguably impels parties towards adversarial positions, increasing the prospect of a court claim.

²⁵⁶ See Chapter 6, paras 276–277.

²⁵⁷ See Chapter 6, paras 278–279.

Chapter 11: Resolving the conflict

Some preliminary remarks

466. It has been clear throughout our enquiries that the divergent views of those who gave evidence are deeply and sometimes passionately held. Scientists testified to their profound and dedicated conviction that research on human remains benefits humanity as a whole, and that to suppress or impede such work is unethical. Claimant communities gave moving accounts of the suffering felt by their communities as a result of the removal and continued retention of human remains, which they see as a continuing affront to their cultural traditions and beliefs. Representatives from the Aboriginal and Torres Strait Islander Commission (ATSIC) testified that the repatriation of remains involves more than the simple redress of past injustices; it is critical to the present physical and psychological health of communities.

467. The claims and disputes that have arisen are therefore charged with ethical and moral issues, which take them far beyond the technical legal arguments about ownership and rights of possession discussed in our legal analysis.²⁵⁸ Even if the issues of legal doctrine were to be clarified (for example, by making it easier for institutions to return remains if they chose to do so), these wider issues would still demand evaluation.

468. We accept unreservedly that the scientific community has performed an incalculable amount of invaluable research by reason of its custody of human remains, and has produced scholarship of the highest order. There is, moreover, substantial and encouraging evidence that holding institutions are increasingly prepared to engage with claimant groups, to their reciprocal benefit. But it is clear that problems remain: partly because particular parties are reluctant to engage in a process of negotiation for the review of claims, and partly because current laws and procedures are inadequate to meet this challenge.

Ascendancy and inequality

469. The position is complicated by the historical legacy of modern UK museums. In many instances a holding museum will occupy a position intermediate between that of claimant groups and scientific interests. It will not necessarily identify wholly with the latter interests, but its intermediate position may well be artificially tilted towards them. This is because the European museum has evolved within the same rationalist tradition that gave birth to modern science, and because scientific endeavour is integral to the purpose of many holding museums. While scientists are often employed by these museums, representatives of indigenous communities are not. This imbalance stands in contrast to the position in countries where indigenous communities reside, where claimant communities are not only employed by, but are typically represented on the governing bodies of, local and national museums. For geographical as well as historical reasons, there is therefore a disparity in influence between the indigenous voice and the scientific voice in the conduct of UK museums. Confronting this asymmetry of influence is essential, not only to the development of responsible and even-handed solutions, but to the perception among claimants and others that the chosen solutions are worthy of trust.

470. Claimant groups feel strongly that this imbalance of power is a strongly negative element in their relations with certain museums. To them, the inequality that existed when the remains were removed survives, in some measure, today. Just as ancestral remains were removed without consent from the control of families or communities that lacked sufficient power to prevent this, so modern claimants now find that their requests for return are hindered by a similar inequality: not least, in that the institutions holding the remains also control the negotiation process (assuming that there is one). The implications are plain. If museums acknowledge no responsibility to enter into discussion with claimants and simply refuse to negotiate, the options open to claimants are highly limited²⁵⁹ and by no means universally desirable to museums. If a museum makes no genuine attempt to engage in dialogue or negotiation, there is no adequate mechanism

²⁵⁹ Examples are (i) simply accepting the situation, (ii) conducting public campaigns for return, or (iii) making expensive and risk-laden applications to the courts.

through which claimants can communicate their concerns and proposals, and no basis on which any sort of constructive negotiation can proceed. This causes frustration and anger and further increases the combative arguments, which in turn, make any potential disputes harder to resolve.

471. In one sense, at least, the position may be fraught with difficulty for museums. If they are (or appear to be) prohibited by statute from relinquishing remains, the prospect of a satisfactory outcome is reduced still further, however sympathetic the museum might be in principle. Relinquishment might then be possible only after a change in the law or, at the very least, an authoritative new interpretation of it.

Law and the legal process

472. Having regard to these matters, it appears to the Working Group that progress depends heavily on two forms of change: appropriate legal reform, and the implementation of an efficient and transparent system for resolving claims. The claims process should, of course, be independent, properly accountable, endowed with sufficient expert knowledge, and capable of producing a fair, objective and consistent appraisal of all relevant arguments.

473. The hypothetical case referred to in Appendix 2 shows the difficulties that each side may encounter if one of them chooses to initiate court proceedings. The adversarial atmosphere of the normal forensic process is wholly unsuited to disputes of this kind. Aside from the fundamental problems raised by the law itself, the rules of evidence and the general machinery of the legal system are likely to make going to law a costly option, and one unlikely to inspire amicable solutions sensitive to all concerns.²⁶⁰ To use a

²⁶⁰ Litigating parties could, of course, choose to opt out of the litigation process for a short period and seek the court's sanction for mediation or other dispute-resolution processes as an alternative way of resolving the dispute once proceedings had commenced. But by that time legal positions are likely to have become entrenched and substantial costs to have been incurred. Parties could alternatively choose to go straight to commercial mediation without first issuing proceedings in court, but this requires their consent. They would need to agree upon the choice of a trained mediator or mediators whom they both respected and who would undoubtedly need expert knowledge of the background and nature of the dispute. How easy this would be is a matter for debate, but it would require a degree of cooperation from the outset, which might be difficult depending on the nature of the parties' relationship. It would also be at a cost which might be prohibitive for parties with limited financial resources.

process founded on a ‘winner takes all’ philosophy, in the course of which ‘black-letter’ legal arguments and positions become increasingly entrenched, cannot but detract attention from other issues of no less importance. The solution that is more likely to work for the parties is one they develop for themselves, through participation in a process that enables them to express their views (in confidence if necessary) and to focus on future relationships derived from negotiation rather than on past wrongs exacerbated by litigation.

474. The critical challenge, therefore, is not simply to uphold strict legal rights regardless of countervailing arguments or remedies. It is to adopt a process that recognises the full spectrum of relevant concerns, appreciates different cultures and values, enables the discharge of responsibilities rather than the mere strict enforcement of rights, and balances these considerations into single and universally acceptable solutions. Such recognition is essential before any meaningful negotiation can occur.

475. We have therefore considered various other alternative dispute resolution methods based on open communication and dialogue. We favour a procedure that follows the mediation model, where any negotiation takes place in a neutral forum so that the perception that one party may have power to manipulate the process is removed, and where both parties agree to enter into the process voluntarily and openly, showing commitment to finding a solution.

476. In proposing these solutions, we feel it is important to keep sight of the fact that one’s perception of the roles of museums and others can all too easily become artificially polarised or even stereotyped. In fact, the spectrum of attitudes is virtually limitless. On the one hand, there have been occasions when a museum has itself taken the initiative in seeking to divest itself of human remains,²⁶¹ even without the immediate certainty of a

²⁶¹ For example, the Bishop Museum at Hawaii: information given to the Chairman by Dr Michael Pickering, National Museum of Australia, Canberra, February 2002.

willing recipient. On the other hand, there have been occasions when an indigenous community has positively rejected the notion that the human remains of its former members should be returned to it.²⁶² We submit that these examples show the perils of trying to fit all cases into a mould and of neglecting the prospect that healthy and forward-looking contact can develop between museums and communities outside the immediate context of repatriation.

The comparison with spoliation

477. Activity in the field of spoliation invites comparison with our own subject matter. At a meeting at the offices of the Tasmanian Aboriginal Centre in Hobart in February 2002, members of the Centre drew the attention of the Chairman of the Working Group to six points of contrast between the recommendations made by the Seventh Report of the Select Committee on Culture, Media and Sport (Select Committee) in relation to Holocaust-related cultural property,²⁶³ and the same Committee's recommendations relating to human remains:²⁶⁴

1. *Setting up a panel.* Even before the publication of the Select Committee Report, the Secretary of State for Culture, Media and Sport had established the Spoliation Advisory Panel. The Select Committee commended this initiative. No such panel had then been established to deal with human remains, and the Select Committee did not explicitly recommend such a panel.
2. *Assistance with provenance.* The Select Committee recommended that the Government provide assistance to museums to enable them to identify the volume and provenance of cultural objects that were possibly tainted by Holocaust

262 For example, the Zuni Tribal Council which, in Resolution No M70-90-LO17 (16 November 1989) asked museums and other institutions to care for and curate (with proper respect) any Zuni ancestral human remains in their possession, the community having taken the view that the remains had been desecrated by their removal and that no adequate measures existed to reverse or mitigate the desecration. See J Watkins, *Indigenous Archaeology: American Indian Values and Scientific Practice* (2000) Walnut Creek: AltaMira, pp 16–17.

263 Op. cit. paras 153–166, 199(xiv)-(xvi).

264 Ibid. paras 167–198, 199(xvii)-(xx).

associations, and to ensure the availability of such research in a common and accessible format. No such assistance was recommended to enable the identification of human remains. The Select Committee merely proposed that the Department for Culture, Media and Sport (DCMS) seek commitments about access to information on holdings of indigenous human remains.

3. *Pace of legislation.* The Select Committee recommended urgent cross-party consultations with the object of securing early and expedited legislation to permit museums to relinquish cultural objects wrongfully taken during the period 1933–1945. No such urgency or expedition was recommended in the case of museum holdings of human remains. The Select Committee did however recommend that DCMS undertake a consultation exercise on the terms of legislation to permit national museums to remove human remains from their collections, with a view to early introduction of such legislation.

4. *Removal of bars.* The Select Committee held that it was essential to remove legislative barriers to the restitution of spoliated cultural objects where restitution was seen to be the appropriate response to a claim. The removal of legislative barriers in relation to human remains was not explicitly stated to be essential. The Select Committee did however consider that the question of human remains might merit specific legislation of its own.

5. *Subordination of educational value to vindication of property.* The Select Committee stressed that continuing public access to spoliated cultural objects in museums must be treated as subordinate to the interests and wishes of rightful owners. It also emphasised the enormous emotional and symbolic value of particular items to particular families and the cardinal value of redressing evil by allowing survivors and their descendants to recover such objects. In the case of human remains, the Select Committee emphasised the tension between scientific

aspirations and community expectations, which might be taken to imply an acceptance of the need for compromise between scientific research and the moral demands of repatriation. The Select Committee did, however, accept that there is a qualitative distinction between human remains and artefacts, and expressed the view that the existing guidance for museums on restitution and repatriation gives insufficient weight to the particular issues concerning claims for the return of human remains.

6. *Material in private hands.* The Select Committee recommended that DCMS undertake discussions with interested parties to explore the extent to which the Spoliation Panel or a similar body could consider issues relating to spoliated cultural objects which are currently in private hands, including the legitimate interests of claimants and current possessors. No such recommendations were made by the Select Committee in relation to human remains which are currently held by private individuals.

478. Those who drew these comparisons unequivocally disclaimed any objection to the measures that were being proposed to assist victims of the Nazi Holocaust, which appeared to them appropriate and just. Nor did they assert that their own circumstances, although the product of much suffering and wrong, were factually congruent with the plight of Nazi Holocaust victims or their surviving families. They did, however, ask the Chairman to bear in mind that their own claims concerned the relics of human beings and not artefacts. In their submission, the measures favoured in relation to objects displaced during the period 1933–1945 suggested a model for the treatment of their own claims, and they asked the Chairman to convey this view to the Working Group.

479. The Working Group has considered this argument and believes that, irrespective of the independent merits of the case for the return of human remains, the comparison is constructive in terms of the remedies proposed.

480. In so concluding, we accept that there can be no exact parallel between the treatment of spoliated material and that of indigenous human remains. It might be argued that it is harder to evaluate on a scale of priorities the scientific and medical benefits of retaining human remains in museums than it is to assess the benefits of the public appreciation of art. On the other hand, the claims of indigenous peoples are for the remains of human beings: their ancestors and families. Their advocates understandably insist that nothing could be more important than that. This material has no inherent economic value and there can be no prospect of commercial gain, or (we suggest) of any financial settlement based on such value.

481. We therefore conclude that the Government's response to the spoliation question provides a useful model for establishing a system for dealing with the treatment of human remains in museums. In particular, we see a role for a national advisory panel (perhaps operating alongside museums' own claims panels) as a mechanism for considering disputed claims. This is further considered at paras 491 et seq below, and in Chapter 12.

Changes in the law

482. Implementation of our recommendations on the removal of legislative barriers will remove the most obvious impediment to repatriation. Such implementation will give those museums that currently consider themselves restrained by statute from disposing of objects from their collections²⁶⁵ the power and confidence to relinquish human remains. These reforms should be made as a matter of urgency. As we explain in Chapter 6, we do not favour the enactment of mandatory divesting legislation compelling the return of remains. We believe, however, that this question should be kept under review, for example to ensure conformity with later developments in legislation, case law and international agreement.

²⁶⁵ Essentially, certain national museums.

483. Once the legislative barrier to return has been removed, national museums will be open to serious claims and requests for repatriation, and will no doubt consider it proper to evaluate each case on its merits. For this reason we believe that there should be a clear, accessible and open policy for resolving disputes concerning the care, treatment, holding and return of human remains, which is based upon dialogue and communication between the parties. Most importantly, the chosen process must not depend solely on the review of arguments or claims by parties who have a personal interest in the outcome. Such partiality would make any reviewing panel tokenistic and inherently flawed. It would also be unlikely to attract sufficient confidence and support for the panel from those potential claimants who might otherwise have invoked it.

Licensing of institutions

484. A further main recommendation is that all institutions holding human remains should be required to be licensed. Institutions would receive licences only if specified standards of treatment and care were met, and only if the institution undertook to observe a Code of Practice (reference given in para 489). The effect of licensing would be to maintain standards, and in particular to reassure claimants that certain common standards are met by all institutions holding human remains.

485. In more detail, we believe that the relevant authority should have the power to give and withhold licences; to promulgate a Code of Practice and require licensed institutions to comply with it; to withhold or withdraw licences from institutions where there is no evidence that the retention of the remains in question will have any long-term research value or other benefit; and to direct the disposal of human remains by unlicensed institutions.

486. Our proposals are in this respect very similar to those put forward by the Department of Health for the oversight and care of post-1948 human organs in the medical context. Since the same basic principles apply in both fields, we believe there would be great advantages if the licensing of museums and allied institutions could be the

responsibility of one of the inspectorates, which, it is proposed, will operate under the oversight of the Human Tissue Authority.

487. The starting-point for an open relationship between the parties must be full disclosure of all human remains held by institutions together with as much information as is possible about their acquisition, treatment, care and handling and any other information associated with them. We accept, of course, that such disclosure may be qualified by considerations of decency, privacy, confidentiality and respect of cultural tradition. We also accept that there may be some institutions that only have limited information about their collections and do not have the resources available to provide comprehensive information without undertaking research to fill the gaps in their knowledge. Such institutions should draw up plans to improve the information on their holdings, particularly where human remains in their care are, or are likely to be, the subject of claims.

488. To this extent, we have recommended that all institutions who wish to continue holding human remains superfluous should be required to obtain a licence to do so, one of the conditions of which would be that they would have to comply with a prescribed Code of Practice setting out basic practice management objectives to which they must conform. A specimen draft is at Appendix 8. Failure to meet the objectives could result in the withdrawal of a licence.

489. The aim of the Code of Practice would be to ensure that all licensed institutions comply with and maintain the standards set, thus imposing positive and objective obligations upon them, which would be externally monitored. This Code would require, *inter alia*, institutions to publish all information concerning human remains under their control, and would enable claimant communities to assess for themselves whether they had an interest in those remains.

Panels

Form and structure of resolution methods

490. We propose two interrelated solutions for the resolution of claims:

1. *Human Remains Advisory Panel.* There should be established by the DCMS a single national external body, which we have provisionally designated the Human Remains Advisory Panel (Advisory Panel). The functions and powers of this panel should broadly conform to those of the Spoliation Advisory Panel. Advisory Panel will be a national committee, comprising independent experts from a variety of relevant disciplines. Members will have no personal interest in the subject matter of the dispute or the outcome of the referral.

Reference to this panel must be consensual. Unless both parties agreed to seek the advice of the panel, no referral could be made.²⁶⁶ Of course, in considering whether to refer to the panel a museum would take account of the advantages to it (as well as to claimants) of doing so. It would also take account of best practice within the museum profession and the Code of Practice adopted as part of the licensing process.

2. *Duty of museums to demonstrate independent dispute resolution process.* Museums should devise, implement and publish standard procedures and criteria for the impartial evaluation of all contested or unresolved claims or controversies concerning human remains within their collections. Such procedures would be independently monitored and assessed by the licensing authority. The object of such supervision would be to ensure that the dispute resolution procedures were adequately structured, effectively operated and compliant with proper standards of good faith, impartiality and consistency.

²⁶⁶ Parties are unlikely in any event to accept advice if they have not voluntarily sought it in the first place.

A museum may comply with this obligation by giving a commitment to refer contested or unresolved claims or controversies to the proposed new Advisory Panel.²⁶⁷

491. Some museums might institute in-house or local advisory panels to pronounce on claims or controversies. A museum might decide to use a local panel as the front-line dispute resolution process, referring to the Advisory Panel as a secondary solution, perhaps where some further issue arose on which the parties would value independent advice. The licensing authority might alternatively consider it appropriate to endorse proposals by a museum to elect solely for reference to a local panel, with no ulterior recourse to the national panel.²⁶⁸ The acceptability of such proposals would depend substantially on the constituency and independence of the local panel proposed, and cannot be determined in the abstract. To a large extent the viability of such local panels would be judged by the willingness of claimants to use them.

492. In any event, we consider it essential that in-house and local panels should have appropriate representation drawn from outside their own institution. Moreover, such representation should not only possess appropriate expertise, but should harbour no personal interest in the subject or outcome of the dispute. Panels comprised solely of individuals either employed by, or associated with, the institution are unlikely to be seen as independent. The outcomes at which they arrived could be undermined by mistrust or disregard.

493. The standards of objectivity, fairness, transparency and consistency achieved by these panels would be monitored by the licensing authority, which would have the power to withhold or revoke a licence to hold human remains.

²⁶⁷ Chapter 12, Recommendation V.

²⁶⁸ Many museums may in fact find themselves able to resolve claims amicably through routine internal evaluation, making recourse to national or local advisory panels unnecessary. It is not our policy to encourage the multiplication of access to procedures where amicable solutions can be reached by simple means.

Attributes of the Human Remains Advisory Panel

494. Advisory Panel would give parties the opportunity to set out in detail their views and arguments before an independent group of experts who would then give non-binding, free advice to the parties. We trust that this advice would assist them in their discussions and enable them to negotiate a solution to the problem without feeling that a decision had been imposed upon them. The panel would not be restricted to claims for the return of remains but would also be empowered to advise on ancillary matters affecting remains, such as concerns about treatment or care.

495. The adoption of the advice or recommendations of the panel would, in common with the matter of original referral, be optional on the part of both museums and claimants. We would expect a museum to take account of all material factors in reaching a decision on this point. One matter to which our independent legal adviser on the Human Rights Act 1998 (HRA) has drawn attention is the possible value of compliance in enabling an institution to defend any later claim grounded on the HRA or other provision of public law: '[A] museum that has referred a case to an independent panel and accepted the advice of the panel would be in a much better position to demonstrate that it had behaved in a reasonable manner, not least for the purpose of resisting any claims under the HRA.'

Timing

496. We have considered the stage at which Advisory Panel should be established, paying particular regard to the fact that some national museums regard themselves as currently prohibited by statute from relinquishing human remains.

497. We have concluded that the panel should be established forthwith, and as a matter of priority, for the following reasons:

- Many museums are not prevented by statute from returning human remains and would benefit from any guidance or advice that the panel could offer.
- The panel would deal not only with claims for the return of human remains, but with other issues relating to them, including storage, handling, treatment and use. These issues affect all museums including those that are currently prohibited from disposing of human remains.
- The panel would have the power to recommend to the Minister for the Arts, if it thought fit, that legislation should be changed to enable particular museums to return human remains, thereby reinforcing the impetus to effect such change expeditiously.

Museums subject to prohibitive statutes

498. Where a museum is prohibited by statute from returning human remains, we recommend that nothing in the new regulatory procedures²⁶⁹ should support any expectation by the licensing authority that the museum will refer requests for the return of remains to an independent advisory panel, whether national or local. Any such expectation should be deferred until a mechanism has been both identified and activated that enables return. Once return becomes legally possible, whether by legislative change or otherwise, the position may change.

499. We recommend two qualifications to this general proposition:

- First, nothing in the proposed exemption would relieve a museum of the responsibility to comply with the Code of Practice in relation to matters other than return, such as the care, treatment and safekeeping of remains. In this context, referral to a national or local panel might well be an expectation of the licensing

²⁶⁹ Viz, the terms of the Code of Practice or the general requirements of the licensing authority.

authority in advance of any legislation empowering the return of human remains.

- Secondly, we advise that those museums which are subject to a continuing prohibition on the return of human remains might nevertheless, as *a matter of good practice, consider it an appropriate use of their discretion to refer claims for return to Advisory Panel*, where such a referral might usefully result in a recommendation to the Minister that the law should be changed.

Benefits and cooperation

500. The creation of independently supervised resolution procedures, in conformity with our recommendations, should go a substantial way towards establishing five distinct benefits:

- reassuring all parties that the process of resolving claims is open, fair, independent and legally defensible;
- affording continuity in the treatment of claims;
- reducing duplication of effort and other demands on resources;
- fostering a mood of understanding among parties;²⁷⁰ and
- exploring constructive alternative solutions to ‘all or nothing’ adversarial attitudes, while recognising the proper limits of compromise;

501. It will be observed that these expected benefits apply to museums and similar institutions as well as to those who are likely to make claims against them. In formulating our proposals we have kept prominently in mind the difficult and ambiguous position in this field of many museums and the potential value, within the proper limits of autonomy,

²⁷⁰ The fact that certain witnesses have made conciliatory statements to the Working Group only on examination further indicates to us the value of an independent point of reference and convinces us that these sensitive matters need not be approached gladiatorially through some ‘win or lose’ contest between adherents of different value systems.

of external guidance and support.

502. As museums throughout the world have found in regard to spoliated material, stonewalling is neither an advisable nor a defensible long-term policy. Adversarial attitudes are laborious, economically wasteful, demoralising, corrosive of future relations and unlikely to afford a true *quietus*. If pursued to litigation, they are public and potentially embarrassing. Worst of all, perhaps, they are never far from the lurking legal quagmire. Rather, parties need to develop that sense of trust which arises from a feeling that they are being taken seriously and that someone is listening to their position, respectfully and without prejudgement. A faithful adherence to such processes can lead to a building of constructive future relations and confer benefits which a mere adversarial process could never achieve.

503. A national independent panel should be able to develop over time a sufficient level of experience to maintain both consistency and credibility in the treatment of disputes. It should also be able to give authoritative legal advice at no cost to the parties and to propose intermediate or compromise solutions where these are culturally appropriate.²⁷¹ Local panels may be able to replicate some of these benefits, albeit on a smaller scale.

271 Such intermediate solutions might (according to circumstances) include the creation of sacred keeping-places within museums, or within local outstations of museums, to be governed by special protocols as to dedication, access and control. Museums could continue to conduct research, but with the active collaboration and consent of relevant indigenous communities, after full explanation of the purpose and direction of such research, and subject to agreed conditions, one of which might be the prior handing over of the remains to the communities in question; or they could await for an agreed period the evolution of new research techniques that are not invasive. They could agree not to publish the results of research unless or until permission is forthcoming from relevant indigenous communities. Interested parties could agree to hand over remains for long-term interment or cremation only after research, or subject only to the retention of samples. Museums could retain only material that could clearly be shown to advance contemporary research, or research likely to be conducted within the reasonable foreseeable future; or accept that the continued physical existence (and therefore the research value) of some material is in any event limited. They could recognise that the key question is the repatriation of authority, and that only after remains have been handed over in recognition of that principle can indigenous communities enter into dialogue and make decisions about research with a degree of authority and autonomy equivalent to that of a contemporary holding museum. They could further recognise that future generations may regard critical matters in a different light and may regret dispositive solutions, that exclude any regard for the potential emergence of such interests or attitudes. Finally, they might increase the representation and voice of relevant indigenous communities within the museum's governing structure. All of these suggestions have arisen in the course of our inquiries and all of them are matters that might, in some cases, form an appropriate foundation for dialogue, or for evaluation by the proposed Human Remains Advisory Panel. In recounting them, however, the Working Group does not imply any preference on the part of any particular interested group, or on its own part, for any particular position. Any such preference could in any event emerge only (if at all) after detailed consideration of the circumstances of the particular case.

504. However, such processes can achieve their full potential only if there is a genuine willingness on both sides to engage in proactive consultation from the outset, to show respect for each others' arguments by listening to the genuine concerns that are held and to seek mutually acceptable solutions. We look to all interested parties for the goodwill and resourcefulness essential to the attainment of these aims.

A note on cost

505. We have been requested at various points in our deliberations to take account of the cost of our proposals and the proportion of expenditure to benefit. These requests must be construed in the light of two facts: first, that the Working Group has received virtually no evidence on the cost of implementing particular recommendations, and secondly that a regard for such 'proportionality' is not explicitly prescribed by the Working Group's terms of reference.

506. Notwithstanding these reservations, the Working Group has throughout conducted its deliberations with an eye to balance, practicality and common sense as well as to more rarefied values. It has sought to indicate those points at which public funding is (or might be) appropriate, and it has sought to keep the responsibilities to be imposed on museums to a workable level, without forsaking those principles whose observance cannot be measured in pecuniary terms.

507. With such matters in mind, those members of the Working Group who support the creation of a national Advisory Panel wish to make the following points.

508. There is already some evidence of potential demand for a national external advisory panel even among those museums that are already favourably disposed towards repatriation. Two of the institutions represented on the Working Group have stated that they would have consulted such a panel when they recently relinquished human remains, even though they had unfettered legal discretion to relinquish. There are grounds for believing that the existence of the Spoliation Advisory Panel has already induced some parties to existing claims to proceed cooperatively towards a jointly devised solution

before referring to the Panel. In a largely uncharted zone, the guidance and support of a non-partisan group of experts with (in time) a store of knowledge and experience of the issues could afford valuable comfort to museums.

509. If proportionality is the yardstick, the balancing exercise should take account of human costs and benefits as well as economic factors. We do not favour a simple comparison of the funds that would be expended on a national panel with the expenditure that would be saved through its creation. Such an analysis would be acutely inappropriate in a field where ethics, spiritual integrity, human rights, the pursuit of understanding and the abatement of injustice cast so prominent a shadow. The exercise should endeavour to draw into account the legitimate needs of claimants and the goodwill to be gained from a public commitment to the objective assessment of claims. It should also take account of financial savings to the museum community by way of reduced management time and legal costs, and such intangible benefits as enhanced credibility, future cultural exchange and relief from uncertainty.

510. There is no sustainable argument that the establishment of a national advisory panel would be disproportionate to the number of potential claims. We make this assessment in the light of the figures produced by the Scoping Survey of Historic Human Remains in English Museums and Other Organisations (Scoping Survey), analysed in Chapter 2. The survey reflects an undercounting of human remains but still confirms that out of 33 requests for return, five decisions remain pending and 21 have been refused. Such refusals have been made not only (in some cases) on grounds that return is prohibited by legislation but also (in some cases) for ‘other reasons’. That position may be compared with the circumstances prevailing at the time of the creation of the Spoliation Advisory Panel, when only one potential claim was apparent. As indicated elsewhere,²⁷² we accept that the Spoliation Advisory Panel offers a constructive model in terms of solutions and remedies within our field. We are also concerned to avoid any suggestion that the issues raised in one case call for a less positive response than in the

²⁷² Para 481.

other. Moreover, the issues on which a national panel could advise are not confined to the return of remains or the terms of retention, but might encompass wider issues, such as methods of return, handling and keeping, and the use and sharing of information derived from human remains. That such issues may not have arisen prominently in the past is no indication that they will not arise in the future, when agreed systems of retention and treatment might become a more common feature of relations between museums and claimants.

511. The establishment of a national advisory panel will provide a model or standard for local panels. The guidance afforded by such a paradigm could be particularly valuable to those museums that propose a local alternative to the national panel. If fewer references are made to the national panel after creation of the local panels, that may be evidence of the success of both types of panel.

512. It appears to us that the greater part of the expenditure on any national advisory panel would derive from running and servicing costs rather than from initial establishment. We have received informal advice that the Spoliation Advisory Panel costs about £4,000 per hearing. While that does not appear excessive, there is room for doubt whether Advisory Panel need cost as much. In any event, expenditure on hearings would arise only if there were a demand for the panel's services. Such a demand would itself suggest a justification for the panel's original establishment.

Chapter 12: Recommendations

Law

I. General

The law as it affects the holding of human remains by museums shall be changed.

II. Museum-governing laws

- (i) The statutes which govern national museums shall be amended to empower national museums to relinquish human remains.
- (ii) Non-national museums shall be given a power to relinquish human remains in so far as this does not already exist.
- (iii) The power of all museums to relinquish human remains shall be made uniform, so far as this can be achieved after making due allowance for constitutional differences among museums.
- (iv) Museums that relinquish human remains in good faith, consistently with a legal power to relinquish and with the terms of their licence and Code of Practice, shall be immune from legal liability.
- (v) Legislation providing for the mandatory return of human remains by museums shall not be introduced at present. The situation should be kept under review in order to take account of future changes in domestic law and treaty obligations and other appropriate conditions.

Note: The amendment of statutes to enable national museums to relinquish human remains is seen by the Natural History Museum as the most important Recommendation in this Report. This view of the importance of the Recommendation is not shared by the British Museum. The British Museum considers that the powers of the Attorney-General to sanction the relinquishment of material from the collections of the Museum should be established before other avenues to relinquishment (such as statutory amendment) are explored. At the time of writing the British Museum awaits the Attorney-General's determination as to whether, as a charity, the Museum has the power to give effect to moral claims which the trustees wish to recognise, provided they receive the Attorney-General's sanction for their proposed course of action.

III. Human remains as property

- (i) The measures we propose shall not (save as expressly provided)²⁷³ affect the general legal principle that there is no property in a human body or its parts. Where any legal or natural person or group of persons currently has property in human remains under existing law, that property should be sustained.

Note: Our Recommendations are founded on the assumption that, if fully implemented, they impose sufficient rights and responsibilities in regard to human remains by other legal means to render the question of property subordinate in this context. A provision similar to this is proposed by the latest Department of Health (DH) document (August 2003) describing the ambit of the proposed Human Tissue Bill. The general legal position may vary where human skill has been applied to human remains rendering them something different from a corpse awaiting burial, or in other exceptional circumstances. A right to possession for purposes of burial may be asserted by personal representatives of the deceased person or others in exceptional circumstances.

²⁷³ See Recommendation X (i).

(ii) Museums and similar institutions that hold collections of human remains shall receive authoritative guidance as to the circumstances in which an application of human skill to human remains may cause them to become property in law.

Dispute resolution

IV. The obligation on institutions

(i) All museums shall have in place, and undertake to use where appropriate, an externally approved procedure for the determination of claims and controversies regarding the retention and treatment of human remains.

Note: It is contemplated that the Licensing Authority will be the appropriate agency to give external approval: see Recommendations VIII-XII below ('Regulation'). Reference to the Human Remains Advisory Panel shall be an externally approved procedure for this purpose.

(ii) Museums shall adopt approaches that enable them to respond consistently and in good faith to approaches from all genealogical and cultural descendants and affiliates concerning human remains, regardless of the origin of such remains and of the existence of relevant policies in countries of origin.

(iii) Museums shall publish their criteria for the return or other special treatment of human remains.

Note: Further procedural recommendations are made in the draft Code of Practice in Appendix 8.

(iv) Compliance with these requirements shall be imposed and monitored by the new Licensing Authority, through its power to grant licences and to sanction individual codes of practice.

V. *A national advisory panel*

(i) There shall be a national Human Remains Advisory Panel (Advisory Panel), to be established by the Department for Culture, Media and Sport (DCMS) in broad conformity with the functions and powers of the Spoliation Advisory Panel.

(ii) The Advisory Panel shall be accessible to all relevant parties with a sufficient interest in the treatment and condition of human remains held in public museum collections. Such access shall be subject to conditions as follows:

- A reference to the Advisory Panel can occur only by common consent of the parties.
- The Advisory Panel shall have the power to make recommendations on all issues relating to the return, retention, treatment, handling, use, safekeeping and control of human remains. Its jurisdiction will extend (but will not be confined) to claims for the return of remains.
- The Advisory Panel will comprise independent experts, appointed by the Minister for the Arts, who will have no affiliation to any of the parties involved and no other personal concern with the subject matter of the claim or controversy or with the outcome of any referral.
- The Advisory Panel shall have the power to make recommendations both to the parties to the claim or other controversy, and to DCMS (for example, in regard to any proposal for legal change).

- Recommendations by the Advisory Panel will be advisory, and will not legally bind the parties or DCMS.

(iii) The Advisory Panel shall be established as soon as reasonably possible. Its establishment shall be independent of the timing of the legislative and other changes recommended elsewhere in this Report.

VI. *Institutional or local panels*

(i) The following recommendations apply where a particular institution decides to establish its own ‘local’ advisory panel to consider issues concerning the return or other treatment of human remains (including research, conservation and display).

Note: The consensual nature of the jurisdiction of the Advisory Panel will leave a wide discretion to individual museums, both in determining whether to establish a local advisory panel and in delineating the role of any such panel. Local advisory panels may be appropriate where institutions are likely to be approached frequently on such issues. Institutions may wish to consider whether reference to the local panel should be a preliminary to any residual reference to the national panel, or a substitute for reference to the national panel.

(ii) Local panels shall be bound by objective standards of independence, fairness, consistency and transparency, and shall have appropriate expert representation drawn from outside the institution. Appointments to local panels shall follow published procedures and criteria, designed to ensure that such panels are perceived as meeting the required standards.

(iii) Where an institution intends to decline any request for a reference to the national panel, and to adopt a local panel as the exclusive forum for individual

references, this intention should be stated in its Code of Practice or otherwise notified to the Licensing Authority, which may impose particular requirements as to the objectivity, fairness, consistency and transparency of the local panel.

(iv) The foregoing standards shall be imposed and monitored by the Licensing Authority through its power to grant licences and to sanction individual codes of practice. If the Licensing Authority is not satisfied on any material point it may withhold or revoke a licence.

VII. Referral to panel: qualifying considerations

(i) No museum that is (or reasonably believes itself to be) prohibited by statute from disposing of human remains within its collections shall be required by the Licensing Authority or Code of Practice to demonstrate access to a local advisory panel for the purpose of hearing claims for the return or other relinquishment of human remains, until the prohibition has been removed or is otherwise shown not to exist.

(ii) Such a museum must still comply with the requirements of the Licensing Authority and Code of Practice on other matters affecting the treatment, handling, use and safekeeping of remains, including research, display and conservation.

(iii) A continuing statutory prohibition on disposal will not prevent a museum from agreeing to refer a claim or controversy to the Advisory Panel where it considers this appropriate.

Note: This may be the case where the museum would find it helpful to have a Recommendation from the panel that the law be changed.

Regulation

VIII. General

- (i) A licensing system shall be introduced, with the object of regulating the holding, return, treatment, handling and disposal of human remains within all museums, in broad conformity with proposals currently being developed by the DH for the proposed Human Tissue Bill.
- (ii) Institutions shall be required, as a condition of licensing, to subscribe publicly to a Code of Practice on the care and management of human remains. A specimen draft of such a code is provided in Appendix 8.
- (iii) Institutions must show a clear understanding, reflected in both policy and practice, that the holding of human remains is a privilege, to be enjoyed only where the institution observes exacting standards of respect, both for the deceased person and for those living persons who are concerned with the remains in question.
- (iv) Breach of the Code of Practice shall give rise to sanctions. These may, according to circumstances, include the loss or suspension of licence, or criminal penalties. Provision for such sanctions should be made within the legislative or other measures that establish the Licensing Authority.

Note: These and the following regulatory Recommendations have arisen in part from three interrelated developments affecting modern law and policy: the formulation by the DH of proposals to introduce statutory regulation over the holding by medical institutions of future-acquired human tissue and organs; the emphasis by the DH on the consent of the deceased or the deceased's surviving kin as a paramount factor in the legitimate retention and use of such human remains by medical institutions; and the human rights guaranteed by the Human Rights Act 1998 (incorporating into domestic

*law the European Convention on Human Rights): see in particular the prohibition on discrimination enshrined in Article 14 of the Convention.*²⁷⁴

IX. Powers of Licensing Authority

The Licensing Authority shall be empowered to:

- grant licences to institutions that hold human remains in accordance with the Code of Practice;
- impose conditions on the grant of licences;
- withhold or withdraw licences from institutions that do not conform to the code;
- withhold or withdraw licences from institutions which cannot adduce evidence to show that long-term research value or other benefit can reasonably be expected to be gained from the retention of human remains by those institutions;
- direct the disposal of human remains by institutions, as a condition of licensing;
- direct the consolidation and rationalisation of holdings where circumstances demand, subject to the principle that no institution shall be required to take responsibility for human remains without its consent;
- provide for the management of unwanted human remains;
- investigate complaints about the activities of licensed and unlicensed institutions; supervise and enforce the measures by which the Licensing Authority is established, the conditions on which any licence is granted, the penalties imposed

²⁷⁴ These matters are discussed at paras 286, 355 and 387 and in Appendix 3.

for breach of any of such requirements and for the holding of human remains without a licence, and the Code of Practice generally.

X. *Consequential provisions*

We make the following detailed recommendations (see also Appendix 2)

(i) Institutions that comply with the requirement of the Licensing Authority shall be deemed to have lawful possession and the right to possession of human remains within their collections, sufficient to enable them to defend their interest at law and to loan the remains to other licensed institutions.

(ii) The foregoing rights shall be subject to, and without prejudice to, such superior interests and obligations as may exist in the particular case, whether by reason of any property in the remains, or of any right of personal representatives or others to have the remains delivered up for burial, or otherwise.

(iii) Provisions on export control shall be clarified and, where necessary, amended to enable cross-border returns of human remains, or other responses which involve the cross-border movement of human material, where desired.

Note: We contemplate that a museum which enjoys, by authority of its licence, the power to loan human remains to other museums will normally be authorised to loan only to another licensed museum. Equivalent assurance may need to be devised for loans to museums overseas. Such matters would ordinarily be articulated in the licence or Code of Practice.

XI. Accountability

The Licensing Authority shall answer to the appropriate government department(s), according to the arrangements for its foundation. It shall also be subject to scrutiny by the proposed Advisory Panel, the relevant holding museums and their professional association(s). It shall contain significant external representation.

XII. Timing

The licensing system shall be introduced as soon as reasonably possible, having regard to the fact that a transition period may be helpful to institutions which may wish to decide whether they cannot, or do not wish to, meet the standards of a licence. Its introduction shall be independent of the timing of the other changes recommended elsewhere in this Report.

Other matters

XIII. Consultation and dialogue

(i) All people concerned with this issue should use their best endeavours to establish mutual respect, understanding and appreciation. In particular, they should exercise such endeavours to identify the common values uniting different cultural systems; to turn different values into reciprocal benefits; to articulate, explore and seek ways of reconciling their own principles, commitments and concerns; and to work together to ensure that the future treatment and destination of human remains derives from agreement and cooperation rather than from confrontation or unilateral initiative.

Note: The reference to people concerned with this issue includes claimant groups, holding institutions, scholars, indigenous communities and other interested persons. The Recommendations in this section are designed to operate in conjunction with our earlier

proposals regarding the institution and use of non-adversarial dispute resolution methods, including the proposed Advisory Panel: see Recommendations IV-VII above ('Dispute Resolution').

(ii) Institutions holding human remains shall exercise their best endeavours to consult openly and proactively with others concerned with this issue and, by means of such dialogue, seek to explore all matters of shared concern. Such matters include the identification of culturally appropriate ways of supporting and encouraging new consensual acquisitions of knowledge and of enhancing scientific access to collections in a manner compatible with the sensitive care and treatment of remains.

(iii) Institutions holding human remains shall produce, and keep under review, concrete and positive proposals for the development of open and continuing dialogue with such parties.

(iv) An institution's proposals for the development of dialogue, and its progress in satisfying those proposals, shall be taken into account by the Licensing Authority.

(v) Commitment to these matters should be declared in the proposed Code of Practice and underpinned by the enforcement measures appropriate to that Code.

(vi) DCMS and Resource should confer with a view to funding and establishing an accessible list of contact persons and organisations to facilitate the process of consultation.

XIV. Documentation and access

(i) Institutions shall exercise their best endeavours to provide reasonable access to their collections and to information about their collections.

- (ii) Such provision shall pay full regard to the sacred/secret nature of human remains as recognised by particular cultures and religions and to the legitimate concerns of genealogical and cultural descendants of the deceased person.

Note: We commend in this regard the guidance given in the document Guidelines for the Sharing of Information between British and Australian Institutions and Aboriginal and Torres Strait Islander People, published by ATSIC in 2002, which offers practical guidance on the authentication of requests for information and the delivery of information in a manner which avoids improper disclosure. We feel that this document offers a helpful model for such requests generally.

- (iii) The information that an institution makes available to claimants (and to others asserting an interest through genealogical or cultural descent) shall include such information as is known to it concerning:

- the volume of human remains held;
- an inventory of the remains held;
- the source area and/or community of origin of the remains;
- the condition of such remains;
- the circumstances of acquisition;
- whether any relevant consent was given;
- the terms and focus of any consent;
- the circumstances of such consent;

- the past experience of and response to claims; and
- details of all treatment and use of the remains (for example, research undertaken on the remains) including the results of any such treatment and use.

(iv) Institutions shall devise and publish a plan to elucidate those holdings which were previously unknown to them, and to improve and develop their own stock of information on holdings, particularly where those holdings are (or can reasonably be expected to be) the subject of claims, whether for repatriation or otherwise.

(v) The foregoing obligations should be implemented and monitored through the Code of Practice wherever possible.

XV. Consent

(i) No institution shall retain, or perform any other act in relation to, human remains where it knows or has compelling reason to believe:

- that the original removal of the remains occurred without the consent of the deceased person or that person's close family, and
- that the present retention or other proposed act is without the consent of:
 1. close family or direct genealogical descendants of the deceased person; or
 2. where no such family or descendants are identified, those who have within the deceased person's own religion or culture a status or responsibility comparable to that of close family or direct genealogical descendants.

Note: part 2 of this Recommendation is a majority recommendation: see Chapter 7 paras 342–358.

(ii) Institutions shall exercise their best endeavours to identify remains held in their collections, and to identify the close family or direct genealogical descendants of the deceased person.

(iii) Where no such family or descendants are identified, institutions shall use their best endeavours to identify those who have within the deceased person's own culture a status or a responsibility comparable to that of close family or direct genealogical descendants.

Note: Recommendation XV (iii) is a majority Recommendation: see Chapter 7 paras 342–358. We consider that museums are entitled to expect that claimant persons or groups asserting a necessary connection with the deceased person will bring forward serious evidence of the connection and of the lack of consent of the deceased person or close family of the deceased person to the original removal of the remains: see para 358. The responsibility of museums to identify relevant persons should be interpreted in that context.

(iv) Where an institution has neither knowledge nor compelling evidence of close family or direct genealogical descendants of the deceased person, or of any person or group that has within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants, the institution shall exercise its best endeavours to consult other appropriately concerned parties whose concerns are known to the institution, and shall take full account of their wishes and concerns, before making any decision regarding the retention or treatment of the remains.

(v) The foregoing obligations should be implemented and monitored through the Code of Practice wherever possible.

XVI. Unclaimed and culturally isolated remains

(i) Institutions holding unclaimed overseas indigenous human remains shall exercise their best endeavours to consult any overseas public authority, entrusted by government with the intermediate reception and stewardship of such remains, in order to determine whether the museum shall relinquish the remains to that entity, or make other appropriate arrangements.

(ii) Institutions shall exercise their best endeavours to determine whether the dictates of conscience and decency compel the reinterment or other relinquishment of unclaimed and culturally isolated human remains, and to respond accordingly.

(iii) Decisions on the foregoing matters shall be recorded and available to public scrutiny.

(iv) The foregoing obligations should be implemented and monitored through the Code of Practice wherever possible.

*Note: Where no existing person or group seeks to impose any restriction on the retention or other treatment of human remains, the fact that the deceased person (or the deceased person's close family) did not consent to the original removal shall not by itself ordinarily restrict the museum's liberty of action with regard to the remains.*²⁷⁵

²⁷⁵ See further Chapter 7 paras 382-386.

XVII. Associated objects

- (i) Material associated with human remains, but not consisting of human remains, shall be excluded from the proposed licensing regime and from the other Recommendations set out in this Report. This Recommendation is conditional on the implementation of those Recommendations that follow.
- (ii) We recommend no present change in the law as it affects the holding by museums of associated objects.
- (iii) We recommend the establishment of a separate ministerial advisory group with a mandate to consider and make recommendations on the holding by museums of sacred objects.
- (iv) The terms of reference of the proposed new group shall include associated objects as understood within this Report,²⁷⁶ and artefacts made partially, but not wholly or largely from human material, but shall not be limited to those categories. The terms of reference of the proposed new group might also include human fossils and subfossils.
- (v) The new group shall have a mandate comparable to that of the present group and shall consider (among other questions) the modification of statutes that prohibit (or may prohibit) museums from relinquishing sacred objects.
- (vi) For the avoidance of doubt, the Recommendations set out elsewhere in this Report apply to artefacts that consist wholly or largely of human remains.

²⁷⁶ See Chapter 8.

Note: We believe that many aspects of our Recommendations regarding human remains represent good general museological practice and should apply equally to associated objects. We refer particularly in this context to the publication of information and the development of open dialogue with claimants and concerned communities. We welcome in this regard (as in others) the decision of Resource to establish a Cultural Property Advisory Unit.

- (vii) We recommend that, until the implementation of any reforms recommended by the proposed new Advisory Group, museums continue to treat issues concerning sacred objects and other artefacts that merit special treatment in accordance with the existing guidelines for restitution and repatriation.²⁷⁷

XVIII. Display, research and storage

- (i) The treatment of human remains for purposes of display and research, and the arrangements made for their storage, shall conform to the highest professional standards. This obligation shall apply whether or not the particular remains are subject to a claim for their return or otherwise.
- (ii) In considering such treatment, institutions shall observe the procedures set out in Recommendations XV (i)-(iv) above ('Consent'). Among other precautions, they shall exercise their best endeavours to identify and respect the views of genealogical and cultural descendants, and to determine whether such persons have within their own culture a status or responsibility comparable to that of close family or direct genealogical descendants. In the case of any unresolved difference, institutions shall refer the matter to the appropriate advisory panel, in accordance with Recommendations IV-VII above ('Dispute Resolution').

²⁷⁷ J.A. Legget, *Restitution and Repatriation: Guidelines for Good Practice* (2000) London: Museums & Galleries Commission.

(iii) The foregoing obligations should be implemented and monitored through the Code of Practice wherever possible.

XIX. Departmental review

i) The Minister for the Arts shall keep under review all matters relating to the holding and treatment of human remains by relevant institutions and the implementation by such institutions and other relevant entities of the Recommendations contained in this Report.

(ii) In particular, the Minister shall keep under review:

- the circumstances operating for and against imperative legislation compelling the relinquishment of human remains;
- the jurisdiction and operation of the Advisory Panel; and
- the progress of the Recommendation, made elsewhere in this Report, for a separate inquiry regarding associated and other objects (see Recommendation XVII above – ‘Associated Objects’).

(iii) The Minister shall consider offering the good offices of DCMS towards the resolution of any claim or other controversy which has not been resolved by other means, and shall consider the promulgation of criteria for the offering of any such participation in the resolution of claims and controversies.

XX. Education and support

(i) DCMS shall (on determining to adopt these Recommendations) consult with Resource, the Museums Association and other concerned groups to devise a plan to publish information on all relevant matters to interested parties.

Note: Relevant matters will include: the Recommendations contained in this Report; the legal position both before and after their adoption; the concerns of overseas indigenous communities; the background to acquisitions and claims; the scientific importance of current holdings of human remains; modern attitudes on scientific ethics; the types of person or group who might have, within a deceased person's own culture, a status or responsibility comparable to that of close family or direct genealogical descendants; the overseas public authorities that might require to be consulted; the law on human remains and human rights; and the values of mediation and other forms of alternative dispute resolution. Individual members of the Working Group have proposed that, during the first twelve months following the publication of this Report, DCMS should direct particular attention to the provision of guidance to museums and other collections and to the immediate steps such institutions should take in order to implement and manage the recommendations. It is contemplated that part of this exercise might (subject to appropriate timing) be delegated to the Cultural Property Advice Unit.

(ii) DCMS, Resource, the Museums Association and other concerned groups shall give early consideration to the conduct of short-term awareness programmes in order to familiarise museums and other collections, and (following consultation with them) indigenous groups and relevant overseas agencies, with:

- the content and implications of this Report;
- the Government's response to it;
- the options and procedures that are or will become open to claimants by reason of it; and
- any other relevant matters raised by persons, groups or institutions for whom the awareness programmes are designed.

Note: Individual members of the Working Group have proposed that a target date of three months from publication of the Report be set for evolution of the awareness programme regarding museums and other collections, and six months for the evolution of the awareness programme regarding indigenous groups and relevant overseas agencies. It is contemplated that such programmes will include the provision of seminars, briefing papers and ad hoc advice for museums and other collections.

- (iii) The Working Group welcomes in this regard the decision by Resource to establish a Cultural Property Advice Unit.

Note: The Working Group attaches central importance to the expeditious establishment of the Cultural Property Advice Unit, to the closest possible collaboration between the Unit and DCMS in the dissemination and explanation of these Recommendations, and to the provision of sufficient resources to enable those functions to be discharged.

- (iv) DCMS should work with other relevant interests to establish a central point to facilitate contact and communication in regard to matters affecting human remains within museum collections.

Note: It is contemplated that those brought into communication by this central point will include not only museums and other collections but scientists, indigenous groups and other relevant public authorities, and that one consequence of this communication will be greater dialogue and understanding among such interests. One suitable medium for this exchange may be cross-cultural seminars at which experiences and approaches can be shared in a spirit of mutual understanding.

XXI. Costs of implementation

- (i) DCMS shall fund the national claims resolution process (the Advisory Panel) and shall (with Resource) undertake primary responsibility for the

production of funding for the educational and support functions referred to in Recommendation XX.

- (ii) Sponsoring Departments and Resource should work together to quantify the other resources required to implement these recommendations, and to identify appropriate sources of funding for the resultant costs to museums.

Note: We contemplate that DCMS will produce by the end of 2004 a scheduled realisation programme. The programme will provide detailed costings and a distribution of responsibility among DCMS, Resource, museums, other collections and other relevant agencies for the implementation of these Recommendations. Without sufficient additional resources many of these Recommendations will, of course, be impossible to implement.

- (iii) Where possible, DCMS shall estimate the time and resources needed to conduct any further necessary check of museum holdings of human remains, and shall both consult and advise overseas indigenous groups with regard to this estimate.

Chapter 13: Statement of dissent from Neil Chalmers

1. Reasons for dissent

1.1 I support many of the main conclusions of the Report. The present situation of conflict between those who hold and research human remains in museums on the one hand and claimant communities on the other is damaging and needs to be resolved. The law needs to be changed to give those museums that are currently prevented from returning human remains the discretion to do so. There needs to be a balance between the undoubted benefits to humanity that flow from medical, scientific and other research on the one hand and the wishes of those communities that are claiming remains on the other. There needs to be a Licensing Authority with the power to enforce high standards of care for human remains that are held in museum collections, and there need to be transparent and publicly acceptable procedures for responding to claims for their return. There needs to be better provision of information to claimant and research communities about the human remains that are held in museum collections. There needs to be greater dialogue, and a greater willingness to work together. Significant additional resources will be needed to bring about these desirable changes.

1.2 However, I dissent from several of the Report's Recommendations in their detailed formulation, and also with significant parts of the main body of the Report. My reasons for dissent fall into three main areas. First, the Report and Recommendations do not provide a proper balance between the public benefits deriving from medical, scientific and other research on the one hand and the wishes of claimant communities on the other. The Report is slanted heavily, both in tone and in substance, in favour of the latter. Second, some of the Recommendations are disproportionately complicated and cumbersome in relation to the problems that they are seeking to resolve. Third, some of the Recommendations are unworkable.

1.3 I amplify these comments below by going through each group of Recommendations from the main Report in turn. Where necessary, I formulate alternative recommendations.

2. Commentary on Recommendations I, II and III relating to the law

2.1 The Report concludes that the law should be changed to give all museums the freedom to return human remains to claimant communities. I fully support this, but have two major reservations about the Report's treatment of this issue. First, it recommends that return should be permissive rather than mandatory, and while I support this position, the Report fails to set out the fundamental, ethically-based reason for coming to this conclusion. Second, while appearing to rule out mandatory return, the Report proposes measures which would effectively introduce a mandatory regime.

2.2 Taking these points in turn, paragraphs 309 to 319 of Chapter 6 give several reasons why permissive rather than mandatory return should be favoured. These are largely pragmatic and operational. No mention is made of the basic, ethical reasons that compel one to come to this conclusion. In my view, legislation in this field should be based on sound ethical reasoning and lead to a situation that is ethically more justifiable than the one that exists prior to the change in legislation.

2.3 We need to move to a situation where in every case the benefits and disbenefits of return or retention can be weighed, balancing a number of factors affecting the strength of the claim for return and a number of factors affecting the degree of public benefit that would arise from retention, in particular for research. Such an assessment of benefits and disbenefits must be based upon a clear set of widely shared principles such as the duty to show respect for persons, the duty to be sensitive to cultural differences and the duty not to exploit the vulnerable. If such an ethically based system is put into effect I am certain that some cases will emerge where return is ethically the right course of action, and other cases where it is not, and where retention is to be chosen.

2.4 It would therefore clearly be unreasonable to introduce a regime of mandatory return which would compel return even when an ethical assessment of particular cases showed it was wrong to do so.

2.5 Second, the Recommendations should not hold out the prospect of mandatory return at a later date as this would undermine the fundamental principle of balance that is being sought. Nor should they allow mandatory return to be achieved through the back door. Such an outcome would be achieved as a result of Recommendation XV which deals with the conditions of consent required from claimant communities. As I show below, this Recommendation would, if implemented, introduce a regime of widespread mandatory return. This is unacceptable. It is important, therefore, that no measures are introduced that would result in widespread mandatory return, whether through the introduction of primary or secondary legislation or by other means.

3. I have one further reservation with respect to Recommendation II.

3.1 Recommendation II (v) may well seem desirable from a museum's point of view, but may not be enforceable in law.

3.2 In the light of the above comments I make the following recommendations in relation to the law.

3.3 The law, as it affects the holding of human remains, should be changed in order to allow an ethically justifiable balance to be achieved between the public benefits of medical, scientific and other research on the one hand and the wishes of claimant communities on the other.

3.4 In order to achieve this balance, museums that are presently prevented from returning human remains by statute or who otherwise do not have the power to return human remains should be empowered to have the discretion to return human remains.

3.5 Specifically, the statutes which govern national museums should be amended to give national museums the discretion to return human remains.

3.6 Legislation providing for the mandatory return of human remains by museums should not be introduced. Nor should other measures be introduced that

would, directly or indirectly, result in the mandatory return of human remains by museums.

4. Commentary on Recommendations IV to XII and XIX on dispute resolution, regulation and departmental review

4.1 The Report recommends an elaborate new system to regulate the holding and use of human remains by museums and to deal with disputes. This system would entail the participation of the museums themselves, a new Licensing Authority, a purely advisory national panel, with the additional option of local panels, and the possible intervention of the Minister for the Arts. The proposed new system is excessively complicated, confuses roles, does not adequately protect the public benefits of research into human remains, and is poorly designed to deal with the issues of regulation and dispute resolution that are raised in the Report. An over-burdensome new system of this nature would be difficult for either claimant communities or museums to come to grips with, and runs the risk of disenfranchising both.

4.2 A simpler system is required which will ensure high standards of care of human remains among museums that hold them and will give confidence to claimant communities and researchers alike that claims for return and proposals for research are being considered transparently and fairly. These two goals would be met by the creation of a Human Remains Licensing Authority. Museums would only be allowed to hold collections of human remains when licensed by the authority. Licences would only be issued when museums conformed to standards specified by the Licensing Authority and set out in a Code of Practice. This code should not be the one set out in Appendix 8, for reasons that I set out later. To be granted a licence a museum would be required to meet standards for the care of collections specified by the authority. It would be required to demonstrate that its collections were being used actively for public benefit, through medical, scientific or other research, or through the provision of information of public benefit. It would also be required to conform to procedures specified by the Licensing Authority for dealing with requests for return from claimant communities and for proposals for use of the collections for research and for the provision of information. The

Licensing Authority would have both lay members and representatives of the research and museum community. It would have legal powers to issue, renew periodically and revoke licenses, and to impose sanctions directly or seek their imposition through the courts. There might be value in subsuming the Licensing Authority within the Human Tissue Authority currently being proposed by the Retained Organs Commission (see for example *A Proposed Framework for the Regulation of Museums, Archives and Collections of Human Bodies, Body Parts, Organs and Tissue* issued by the Retained Organs Commission in June 2003, and *Proposals for New Legislation on Human Organs and Tissue* issued by the Department of Health in September 2003). This possibility should be explored, recognising that particular conditions apply to museum collections of human remains, and that the public benefits arising from museum collections of human remains extend beyond the purely medical.

4.3 The system proposed here properly puts the accountability and responsibility for the care and use of human collections where they belong, namely with the governing bodies of the museums that hold them, and the powers of independent enforcement where they belong, namely with the Licensing Authority. There is, in my view, no role for a Human Remains Advisory Panel as advocated in the Report, nor, with due respect, for ministerial intervention. This is not to deny the importance of licensed museums having access to authoritative, independent advice from both the research and the claimant communities when considering a claim for return, a research proposal or the conditions of care for their collections. Such advice may be invaluable in helping a museum to meet the standards stipulated by the Licensing Authority. Such advice might come from many sources, depending upon the nature of the claim. I would favour that each licensed museum should have an ethics committee with both lay and research representatives. A possible parallel exists in the NHS system of Local Research Ethics Committees. However, there are other possibilities, including an advisory service run by the museum sector itself, liaison groups set up between one or more licensed museums and representatives of claimant communities, and so on. The main driving force behind public acceptability will, however, be the power and independence of the Licensing Authority, and not the existence of channels of advice.

4.4 I am not in favour of the main Report's Recommendation XIX (iii), namely that the Minister shall consider offering the good offices of the Department for Culture, Media and Sport (DCMS) towards the resolution of any claim or other controversy which has not been resolved by other means. Certainly, in the case of the national museums there is a clear and important separation between the powers of the Minister and those of the museums' governing bodies, namely their boards of trustees. The independence of these boards is set out in statute, and would risk being compromised if this Recommendation were accepted.

4.5 I differ also from the main Report's conclusion, set out in Recommendation XII, that the introduction of a licensing system should be independent of the legislative and other changes recommended in the report. Those museums that are at present barred by statute from returning human remains currently have no ability to respond to what the Report has demonstrated to be overwhelmingly the most important issue for claimant communities – namely the return of remains of their ancestors. Without this freedom to return, a new Licensing Authority will be seen by all parties to be largely cosmetic, and its credibility will be damaged. In my view therefore, the first and urgent priority is to introduce legislative changes to give all museums the discretion to return human remains. The new licensing system should be introduced once this freedom to return has been achieved.

4.6 In the light of the above, I make the following recommendations in place of the Report's Recommendations IV to XII and XIX (iii).

4.7 There should be a Human Remains Licensing Authority with powers to operate a licensing system for museums holding human remains that would enforce high standards of their care and would ensure that requests for return and proposals for research were considered by such museums in a way that was seen to be transparent, ethically consistent and fair in the eyes of research and claimant communities.

4.8 The Licensing Authority would have lay members and representatives from the research and museums communities. The possibility should be explored of subsuming the authority within the proposed human tissue authority.

4.9 The licensing system should be introduced as soon as practicable but not before the legislative restrictions on return that apply to some museums have been removed.

4.10 There should not be a national Human Remains Advisory Panel.

4.11 The arm's-length relationship that currently operates between boards of trustees of national museums and Government should not be compromised by involvement of ministers or officials in dispute resolution.

5. Commentary on Recommendations XV, XVI and XVIII (ii) concerning Consent and Unclaimed Remains

5.1 These three Recommendations, if implemented, would bring all research upon human remains from claimant communities to a halt and would result in their mandatory return to those communities. This is not acceptable, and would severely damage the public benefit derived from museum collections of human remains. These Recommendations propose that consent from genealogical descendants or their community surrogates must have total priority over any other considerations irrespective of the age, or certainty of identity of the human remains in question, or the distance of relationship between the deceased and the claimants. They take no account of the public value of research based upon the human remains. These Recommendations cannot be said to strike a fair and defensible balance between the interests of claimant communities and the public benefits that arise from research. They are not based upon a framework of public ethics, and are extreme in comparison with related areas where issues of public ethics are involved, most notably in the area of the retention of human organs and tissues. Thus the proposals for new legislation on human organs and tissue issued by the Department of Health in September 2003 state that the purpose of such legislation is to 'strike an acceptable balance between the rights and expectations of individuals and

families, and broader considerations, such as the importance to the population as a whole of research, education, training, pathology and public health monitoring’.

5.2 In order to achieve such a balance it is, in my view, necessary to have a series of guidelines that would constitute an ethical framework on which to base decision-making. These should allow the strength of a claim for return to be judged against whether the identity and geographical or community origins of the deceased are known or not, on how recently or far in the past the deceased lived, on how closely, if at all, those making the claim are related to the deceased, and on the circumstances by which the deceased came into the museum’s possession. It will also need to be judged against whether the human remains that are being claimed have thus far contributed information of significant public benefit, or whether research that is being proposed is likely to do so. If such principles are applied, clear cases will emerge when the views of near relatives and close lineal descendants will override other considerations, leading to return. Conversely, there will be other cases where the public interest deriving from research into the human remains will prove to be paramount, leading to retention and further research.

5.3 Finally, Recommendations XV and XVI recommend that museums should use their best endeavours to contact the close family or direct genealogical descendants of deceased persons, failing that their community surrogates, failing that again all other concerned parties whose concerns are known to the museum. On top of this, museums would be required to contact public authorities in all countries from which human remains in their collections derive, whether or not claims are being made. Given the size of the collections of some museums and the imperfect state of knowledge of their provenance; the diversity within some communities of community representatives, and of their views; and given the many other practical difficulties of identifying and establishing effective communication with the appropriate communities and individuals, these proposals are disproportionate, unrealistic and unworkable.

5.4 In the light of the above I do not support Recommendations XV, XVI and XVIII (ii), and in their place would substitute the following recommendation.

5.5 Decisions to retain or return human remains should be taken in the light of wide consultation, and take into account as much information as is possible about the deceased. This should include the identity and wishes of the deceased, the community or geographical origin of the deceased, the cultural values of the claimant community, if known, the length of time since the death of the deceased, the closeness or distance of family or community relationships of those claiming the return, the circumstances under which the remains of the deceased were obtained and the public benefit derived or to be derived by their retention and research.

6. Commentary on the draft Code of Practice for the treatment, safe keeping and care of collections

6.1 The draft Code of Practice which appears at Appendix 8 and which is referred to in several places within the body of the Report repeats many of its principal features. My reservations about the Report therefore apply also to the Code, which does not in my view provide an acceptable basis for adoption by a new Licensing Authority. The Licensing Authority will certainly need to develop a Code and to require compliance with the Code as a condition of the issuing of a licence to a museum, thereby entitling it to hold and conduct research upon human remains. Such a Code must specify standards for the physical conditions of care of the collections, including their security and access arrangements. It must require a museum to show how the conditions under which the human remains are held have been informed by respect for and understanding of the people who have died and of their communities. It must also require a museum to show how these conditions are appropriate to the conservation and research needs of the research community. The Code should require a museum to demonstrate that it has taken reasonable steps to ensure that any new research proposal involving human remains in its collections has been informed by authoritative and independent advice before such research is undertaken. The Code should also require a museum holding human remains to comply with procedures defined by the Licensing Authority for handling claims for return. Such procedures would require that a museum took into account independent and authoritative advice in relation to the interests of both the research and the claimant communities. The Code should also specify the standards of documentation and information provision required both for claimant communities and for general public

benefit in relation to medical, scientific and other research. Finally, the Code should require a museum to demonstrate that it gives adequate training to its staff who care for and research the collections, as well as to authorised visitors to the collections.

6.2 I therefore recommend that the new Licensing Authority develop a Code with the features outlined in the above paragraph. Compliance with this Code would be mandatory for a licence holder.

Neil Chalmers

Appendix 1: Powers of disposal for museums

National Heritage Act 1983

6 *Acquisition and disposal of objects*

- (1) The Board may acquire (whether by purchase, exchange or gift) any objects which in their opinion it is desirable to add to their collections.

- (2) Without prejudice to any power apart from this subsection, a Minister of the Crown may transfer to the Board any object (whether or not he acquired it before the Board's establishment) if in his opinion it would appropriately form part of their collections.

- (3) The Board may not dispose of an object the property in which is vested in them and which is comprised in their collections unless:
 - (a) the disposal is by way of sale, exchange or gift of an object which is a duplicate of another object the property in which is so vested and which is so comprised, or
 - (b) the disposal is by way of sale, exchange or gift of an object which in the Board's opinion is unsuitable for retention in their collections and can be disposed of without detriment to the interests of students or other members of the public, or
 - (c) the disposal is an exercise of the power conferred by section 6 of the Museums and Galleries Act 1992, or
 - (d) the disposal (by whatever means, including destruction) is of an object which the Board are satisfied has become useless for the purposes of their collections by reason of damage, physical deterioration, or infestation by destructive organisms.

14 *Acquisition and disposal of objects*

- (3) The Board may not dispose of an object the property in which is vested in them and which is comprised in their collections unless:
- (a) the disposal is by way of sale, exchange or gift of an object which is a duplicate of another object the property in which is so vested and which is so comprised, or
 - (b) the disposal is by way of sale, exchange or gift of an object which in the Board's opinion is unsuitable for retention in their collections and can be disposed of without detriment to the interests of students or other members of the public, or
 - (c) the disposal is an exercise of the power conferred by section 6 of the Museums and Galleries Act 1992, or
 - (d) the disposal (by whatever means, including destruction) is of an object which the Board are satisfied has become useless for the purposes of their collections by reason of damage, physical deterioration, or infestation by destructive organisms.

20 *Acquisition and disposal of objects*

- (3) The Board may not dispose of an object the property in which is vested in them and which is comprised in their collection unless:
- (a) the disposal is by way of sale, exchange or gift of an object which is a duplicate of another object the property in which is so vested and which is so comprised, or
 - (b) the disposal is by way of sale, exchange or gift of an object which in the Board's opinion is unsuitable for retention in their collection and can be disposed of without detriment to the interests of students or other members of the public, or

- (c) the disposal is an exercise of the power conferred by section 6 of the Museums and Galleries Act 1992, or
- (d) the disposal (by whatever means, including destruction) is of an object which the Board are satisfied has become useless for the purposes of their collection by reason of damage, physical deterioration, or infestation by destructive organisms.

British Library Act 1972

Schedule 11

- (4) The power of the Board to dispose of an article transferred to them by section 3 (1) (a) of this Act shall be exercisable only if:
 - (a) it is a duplicate of another article in the Board's collections (whether or not so transferred), or
 - (b) it appears to the Board to have been printed not earlier than the year 1850, and a copy of that article made by photography or a process akin to photography is held by the Board, or
 - (c) in the opinion of the Board it is unfit to be retained in their collections and can be disposed of without detriment to the interests of the students; or
 - (d) the disposal is an exercise of the power conferred by section 6 of the Museums and Galleries Act 1992.

British Museum Act 1963

5 Disposal of objects

- (1) The Trustees of the British Museum may sell, exchange, give away or otherwise dispose of any object vested in them and comprised in their collections if:

- (a) the object is a duplicate of another object, or
- (b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees, or
- (c) in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students:

Provided that where an object has become vested in the Trustees by virtue of a gift or bequest the powers conferred by this subsection shall not be exercisable as respects that object in a manner inconsistent with any condition attached to the gift or bequest.

- (2) The Trustees may destroy or otherwise dispose of any object vested in them and comprised in their collections if satisfied that it has become useless for the purposes of the Museum by reason of damage, physical deterioration, or infestation by destructive organisms.

8 *Separation of Natural History Museum*

- (3) Sections 2 to 7 of this Act and the First Schedule thereto shall apply in relation to the Natural History Museum and the Trustees thereof as they apply in relation to the British Museum and the Trustees thereof, but with the following adaptations, that is to say:
 - (a) section 4 shall apply as if, after the words ‘may lend for public exhibition’ there were inserted the words ‘or research;
 - (b) the First Schedule shall apply as if in paragraph 4 (which specifies the quorum at meetings) the word ‘four’ were substituted for the word ‘six’.

Museums and Galleries Act 1992**4** *Acquisition and disposal of pictures and other objects*

- (3) The National Gallery Board shall not dispose of a relevant object the property in which is vested in them and which is comprised in their collection unless the disposal is an exercise of the power conferred by section 6 below.
- (4) The Tate Gallery Board shall not dispose of a relevant object the property in which is vested in them and which is comprised in their collections unless:
- (a) the disposal is an exercise of the power conferred by section 6 below;
 - (b) the disposal is of a relevant object which, in the Board's opinion, is unsuitable for retention in their collections and can be disposed of without detriment to the interests of students or other members of the public; or
 - (c) the disposal (by whatever means, including destruction) is of a relevant object which the Board are satisfied has become useless for the purposes of their collections by reason of damage, physical deterioration, or infestation by destructive organisms;

but this subsection is without prejudice to any trust or condition (express or implied) prohibiting or restricting disposal of the relevant object.

- (5) The National Portrait Gallery Board shall not dispose of a relevant object the property in which is vested in them and which is comprised in their collection unless:
- (a) the disposal is an exercise of the power conferred by section 6 below;
 - (b) the disposal is by way of sale, exchange or gift of a relevant object which is a duplicate of another relevant object the property in which is so vested and which is so comprised;

- (c) the disposal (by whatever means) is of a portrait and the Board are satisfied that the identification formerly accepted by them of the person portrayed has been discredited; or
 - (d) the disposal (by whatever means, including destruction) is of a relevant object which the Board are satisfied has become useless for the purposes of their collection by reason of damage, physical deterioration or infestation by destructive organisms;
- and a relevant object may be disposed of by the Board as mentioned in paragraph (d) above notwithstanding a trust or condition (express or implied) prohibiting or restricting the disposal of the relevant object.
- (6) The Wallace Collection Board shall neither add any object to their collection nor dispose of any object the property in which is vested in them and which is comprised in their collection.

Appendix 2: Law on human remains in museum collections – a working survey

Property in human material

The general rule

1. It is a general principle of English law that there can be no property in a corpse. The rule appears to extend to stillborn children and to parts of bodies such as limbs or internal organs. It may well extend to other human material such as hair and nails and to human products such as blood, semen, urine or cells.
2. Though obscure in origin, and subject to important exceptions, the general rule has twice been upheld by the Court of Appeal over the past seven years and must be taken as established¹. It seems to follow from it that there can similarly be no legal possession of human material.

Legal consequences

3. Taken to its literal extremes, the rule has far-reaching consequences. Human material would be generally excluded from those statutes (for example, the Theft Act 1968) that refer to ‘property’ or those (for example, the Sale of Goods Act 1979) that impose obligations as to ‘title’. In so far as the prohibitions on disposal from national museums and galleries are limited to material that is the property of the museum or gallery, those prohibitions may not inhibit the disposal of human material, which is (other than exceptionally) not property. Human material is almost certainly excluded from statutes which suppose the existence of ‘goods’, such as the Torts (Interference with Goods) Act 1977, the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982. Such material is also presumably excluded from common law concepts such as bailment (the common law relationship between the owner of goods and their possessor) and the tort of conversion (a common law wrong actionable by someone having possession or the immediate right of possession of goods). A similar exclusion might prevent a

¹ *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474, CA, noted by Norman Palmer in (1996) I Art, Antiquity and Law 414; *R v Kelly and another* [1998] 3 All ER 741, CA, noted by Norman Palmer in (1998) III Art, Antiquity and Law 299.

defendant from invoking the statutory limitation period in the Limitation Act 1980 which applies to claims for the conversion of goods, in the unlikely event that a claim for the conversion of human remains can be mounted in the first place.²

4. None of these exclusions necessarily inhibits the supply of human material in return for money or other benefits, or its delivery for temporary purposes such as 'loan' to a museum. Such transactions are not uncommon and often pass uncontested³. But the general rule will prevent an aggrieved party to one of these transactions from enforcing rights that would be open to those dealing in any other form of tangible matter, such as animal remains. If a collector purports to 'buy' a Scythian skeleton and finds that the 'seller' is not the 'owner' or that the skeleton is a fake, it appears that the normal remedies under the Sale of Goods Act as to title and compliance with description are not available to him. If an occupier finds the relics of a saint on her land, the normal rules as to possessory title may not be capable of applying in her favour. If a dealer purports to 'bail' a *mokomokai* to a museum which does not return it at the end of the agreed period the dealer may be unable to use the normal possessory remedies to recover it. If a museum disposes of human material in apparent breach of its statute it may answer that the material was not its property and that nothing therefore constrains its disposal. If an aggrieved descendant of a person whose remains are in a museum takes the remains without the museum's consent that might not be theft⁴

Purposive construction of statutes

5. The foregoing takes an extreme stance for purposes of illustration. Many of the

2 Cf. *Moore v Regents of the University of California* 202 Cal App 3d 1230 (Cal App 1988), reversed 793 p 2d 479 (Cal Supp); Roger S. Magnusson, 'Proprietary Rights in Human Tissue', in Norman Palmer and Ewan McKendrick, eds., *Interests in Goods* (2nd edn. 1998) London: LLP pp 52-55. It might even be argued that the right to peaceful enjoyment of one's 'possessions' guaranteed by Article 1 of the First Protocol to the European Convention on Human Rights might not apply to human material falling within the general rule, which cannot be the subject of possession in law. One potential effect might be that a private museum required by legislation to dispose of human material against its will could not resist on the ground that this subverts its right to peaceful enjoyment of its possessions. But it may be countered that the Convention should not be construed in so technical a manner. See generally, as to human rights, Appendix 3.

3 Similarly there have been cases where one person has sued another for the delivery up of human remains and arguments grounded on lack of property appear not to have been advanced. See, for example, R. Faux, 'Edward the Martyr's bones are to be moved', in *The Times*, 26 April 1988.

4 But it might well be an offence under the Theft Act 1968 section 11: see Humphrey Wine, 'The missing Goya: section 11 of the Theft Act 1968', in (2001) VI Art Antiquity and Law 301.

questions raised are in fact undecided. In practice judicial ingenuity may favour a less extreme position than a complete ban on property or possession. For example, a court may take the view that words like ‘property’ and ‘possession’ in statutes must be construed according to their context and statutory purpose, and that the same word may therefore carry different meanings in different statutes, or as between statute and common law. An example can be found in a modern Western Australian decision that tissue samples are ‘property’ within a local procedural statute enabling tests to be conducted on ‘any property’.⁵ In *Roche v Douglas*⁶ Master Sanderson pointed that the general ‘no-property’ rule was evolved in Australia some 50 years before the identification of the double helix and that to apply it to tissue samples would be to create an irrational legal fiction. Other judges have simply ignored the general rule and treated the unauthorised taking of (for example) blood, hair and urine as theft.⁷ There is at least one modern occasion when rival claims for the possession of ancient bones (allegedly those of St Edmund the Martyr) were litigated without reference to the general rule.⁸

Use of neutral language

6. A statute using such neutral phrases as ‘articles’, ‘objects’, ‘things’, ‘material’ or ‘collections’ may carry none of the baggage of the no-property rule and may take which restrains Trustees from disposing of “any object vested in them and comprised in their collections”⁹ may similarly take effect free of the no-property rule, although the concurrent use of the word ‘vested’ might still limit the restraint to those objects owned by the Museum.

Other cases where property is irrelevant

7. Some requests for the repatriation of human remains can be resolved without reference to concepts of property and possession. This may occur by reason of the present location of the remains or other circumstance. Certain non-national museums, for example, appear to have no statutory restraints on disposal, and to be subject to no other decisive fetter on their power to deal with human material

⁵ *Roche v Douglas* (2000) 22 WAR 331. But Cf *Re Gray* [2001]2 Qd R35.

⁶ (2000) 22 WAR 331.

⁷ Sir John Smith QC, FBA, *Law of Theft* (8th edn., 1997) p 45.

⁸ See R. Faux, *op.cit.*

⁹ British Museum Act 1963 section 5(1).

as they deem fit. Such museums may therefore have a discretion, enabling them to return material regardless of whether the claimants have any original and surviving property in it. Certainly no explicit restraint appears from the Public Libraries and Museums Act 1964, which governs most local authority museums. University museums may be restrained by their charitable status, but again the position is unclear. It might be argued that a university's main objects are teaching and research and that the retention of museum objects is not a principal object.¹⁰ Much may depend on the areas in which the university specialises and the identity of its academic departments. In 1996 the Museums & Galleries Commission concluded that it was 'almost impossible to state hard or fast rules about the protection which university collection might enjoy.'¹¹ It could be argued that this difficulty is, if anything, all the more pronounced in relation to human remains.

8. A similar freedom from the archaic doctrines of common law property may be enjoyed by non-museum repositories of human remains, such as churches and cathedrals. In *In Re St Mary the Virgin, Hurley*¹² the Consistory Court of the Diocese of Oxford exercised its jurisdiction to order the (unopposed) return to Brazil of human remains from a Church of England church vault. The status of the court and the language of the applicable law enabled it to do so without reference to property issues.
9. To an observer outside England and Wales these distinctions may well appear capricious and absurd. The circumstances which govern the destination of cultural objects, and the ability of holding institutions to release them, seem to vary irrationally from case to case. It seems preferable that these distinctions be erased and that all human remains held in public museums be subject to a common policy.

10 Cf. Debra Morris in Norman Palmer, *Museums and the Holocaust: Law, Principles and Practice* (2000) London: Institute of Art and Law.

11 Jeremy Warren, edn. *The Legal Status of Museum Collections in the United Kingdom* (1996) London: Museums & Galleries Commission pp24-25. And see Norman Palmer, 'The museum perspective', in *Museums and the Holocaust: Law, Principles and Practice* (2000) London: Institute of Art and Law pp 35 et seq.

12 [2001] 1 WLR 831 and *The Times*, 26 January 2001. The decision is noted by Charlotte Woodhead: 'Exhumation of a national hero and return to his homeland' in (2003) VIII Art Antiquity and Law 289.

Exceptions

Treatment and transformation

10. Human material may become property or goods where it has, after death or separation, been subjected to treatment that has rendered its condition different from that of a mere corpse awaiting burial.¹³ Mummies may well fall into this exceptional category, as might mokomakai and those items (such as bone, skulls or hair) which have been made into artefacts. A modern example, drawn almost at random, may be the Aztec drinking vessel fashioned from a skull, which was exhibited at the Royal Academy in 2002-03. Whether pathological specimens attract the exception seems to depend on the nature and extent of the preservative treatment¹⁴

Burial rights

11. Personal representatives of deceased persons are generally entitled to the possession of the body for purposes of burial.¹⁵ Under the law of England and Wales, the body must generally be delivered to the executors where the deceased leaves a will and to the administrators where he/she dies intestate.¹⁶ In the case of an unmarried person, particularly an adult, this may not necessarily be the parent. In *In the Estate of Childs, Buchanan v Milton*,¹⁷ a deceased man of Aboriginal parentage who had been adopted and brought to England from Queensland. He died in England leaving a child of his own. Hale J (applying normal principles) appointed as administrators the unmarried

13 See *R v Kelly* [1998] 3 All ER 741 at 749, CA, where Rose LJ stated: 'Parts of a corpse are capable of being property within s.4 of the Theft Act, if they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes.' See also *Doodeward v Spence* (1908) 6 CLR 406 at 413-414 per Griffith CJ (High Court of Australia). Compare the case of the artist Robert Lenkiewicz, whose executors (the Lenkiewicz Foundation) were held by the Plymouth and South Devon Coroner (Nigel Meadows) to be entitled to possession of the embalmed corpse of a 72-year old man (Edwin MacKenzie) found in a chest of drawers at the artist's studio at the Barbican (Plymouth) after the artist's death: *The Times*, 12 October, 12 November 2002 and *The Independent*, 12 November 2002. The coroner is reported as having said (*The Times*, 12 November 2002): 'I am satisfied that the late Robert Lenkiewicz obtained lawful possession of the body originally and that while it was in his possession he arranged for it to be embalmed. In my view this process gave him the right to continued possession.'

14 Cf. the facts of *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474, CA, with those of *R v Kelly* [1998] 3 All ER 741, CA.

15 See *Williams v Williams* (1882) 20 Ch. D. 659 at 665. 16. This was held in *Dobson v North Tyneside Health Authority* 4 All ER 474, CA, though the rule did not operate on the facts of that case. 17 (1999) 27 May (High Court, Family Division); (2000) 53 BMLR 176.

16 This was held in *Dobson v North Tyneside Health Authority* [1996] 4 All ER 474, CA though the rule did not operate on the facts of that case.

17 (1999) 27 May (High Court, Family Division); (2000) 53 BMLR 176.

mother of his child and his adoptive mother, and declined to appoint his natural mother, who had sought the return of the deceased man's remains to Australia. The judge accepted that she had the statutory discretion to make an appointment of the natural mother if that were shown to be 'necessary and expedient' but held that such an appointment was not appropriate in the present circumstances. The result was that the deceased was buried in England and not in Queensland.

12. There are indications from overseas case law that the right to bury a deceased person may be invoked by genealogical or cultural descendants long after the death. The grant of letters of administration by a court in New Zealand contributed to the successful opposition by a Maori group to the auction at Bonhams of the mokomokai (tattooed head) of a tupuna (warrior) in 1988.¹⁸ The head was eventually withdrawn from sale. In theory such rights might be used to obtain possession from a museum. It is unclear, however, whether an English court would grant letters of administration to the remote descendants or cultural affiliates of a person who died many decades ago, or even whether such a court would necessarily give effect to the grant of letters of administration by an overseas court. In the tupuna case, where the descendants' application was favourably received by the New Zealand court, the matter was eventually settled and was not tested before any English court. There is a further question whether a right of delivery for burial would be recognised in opposition to a museum statute prohibiting disposal.¹⁹
13. In the USA this right of possession for burial has been described as a form of 'quasi-property,' but it is unclear whether much of value is added by such labelling.²⁰ A preferable approach seems to be to examine first the legal incidents attaching to the particular human material, and then to conclude whether it merits classification as property, rather than to classify it first as property and work out its legal characteristics from that. Property, in other

¹⁸ Unreported decision. The case is noted by Professor Patrick O'Keefe in (1992) II International Journal of Cultural Property 393.

¹⁹ See further Appendix 3 (human rights).

²⁰ E.g. *Rivers v Greenwood Cemetery* 22 S.E. 2d 134 (1942), 135; *Spiegel v Evergreen Cemetery Co.* 186 A. 585 (1936) 586; *Lubin v Sydenham Hospital* 42 N.Y.S. 2d 654 (1943) 656; *Sinai Temple v Kaplan* 127 Cal. Repr. 80

words, should be a conclusion and not a premise.

Keeping pace with developments

14. Courts may devise further exceptions to the general rule to cater for modern situations that were unforeseen at the time it was established.²¹ This open-ended exception may be particularly significant in the light of the discovery of DNA²² and of modern attitudes towards the treatment of indigenous human remains.

Some absurd distinctions

15. The idiosyncrasies of the no-property rule are further accentuated by the fact that it does not apply to collateral forms of material which might justifiably be treated in the same way as human remains but which, because they are not human remains, attract different legal principles.

from human material but has become something different in law by reason of the application of skill and labour.²³ We accept that some religions and cultures may themselves regard such artefacts as conceptually different from, and as falling beyond any claim for, unaltered human remains. But others may see no difference and may question why a collector should be allowed to enhance his or her rights by interfering with human remains to the point of transformation: the greater the violation the greater the right. While each case must be dealt with on its own facts, the no-property rule seems to contribute nothing of value to the resolution of such claims. At best, it does not enable the better resolution of claims to altered remains and it hinders the proper resolution of claims to unaltered remains.

17. A further example consists of funerary or other sacred objects which are so closely associated with human remains that it might be decent and proper to treat them in comparable manner. At present such parity of treatment may be hampered

(1976) 85. See Roger S. Magnusson, 'Proprietary rights in human tissue', in Norman Palmer and Ewan McKendrick eds., *Interests in Goods* (2nd edn., 1998) London: LLP Chapter 2.

21 *R v Kelly* [1998] 3 All ER 741 at 750 per Rose LJ: 'The common law does not stand still. It may be that if, on some future occasion, the question arises, the courts will hold that human body parts are capable of being property for the purposes of section 4 [of the Theft Act 1968], even without the acquisition of different attributes, if they have a use or significance beyond their mere existence. This may be so if, for example, they are intended for use in an organ transplant operation, for the extraction of DNA or, for that matter, as an exhibit at trial.'

22 See also *Roche v Douglas* (2000) 22 WAR 331.23 See note 13.

23 See note 13.

by the no-property rule which may apply to the remains but not to the associated objects. Few archaeologists would view with enthusiasm a legal regime which distributes the components in a grave assemblage differently according to whether they are human remains or artefacts. Descendants and cultural affiliates of the deceased person are unlikely to react with greater enthusiasm. Associated objects are within our terms of reference and we have made Recommendations about them in the main text of this Report.²⁴

A different vocabulary

18. It is sometimes said that one challenge arising from the relations of indigenous and colonial societies is the evolution of a common set of values by which to recognise and alleviate past inequalities.²⁵ To an extent this problem may be reflected in the different concepts that underlie claims in regard to human remains.
19. Traditional procedures for the resolution of claims have done little to encourage the evolution of a common currency. In large part this may be laid at the door of the apparent statutory prohibition on disposal. On past form, a national museum (at least) is likely to analyse a claim for the return of human remains primarily in terms of statutory interpretation. It will consult its rights and obligations, the legal authority vested in it to dispose of objects, and its public responsibility, all as defined by the parent statute. Only within those narrow parameters is a national museum (at least) likely to perceive any scope for an independent subjective position, however much it might otherwise have wished to respond to the claim on its substantive merits. It would probably see no reason to adopt a creative interpretation of its statute which may lend encouragement to claimants, or to give them advice about alternative redress, or to offer substantive rather than formal or procedural justification of its retention. In terms of its public responsibility, the museum might construe the relevant public as those who visit the museum (or its borrower institutions) for instruction and entertainment, together with the scholars who work within it and the students of their scholarship. One section in the statute governing the British Museum and the Natural History Museum, which sanctions

²⁴ Chapter 8.

²⁵ Cf. Marjorie Barnard, *A History of Australia* (1976) Australian Classics p 668 (a passage that contains some contentious assumptions).

- the disposal of objects that are unfit for retention, specifically requires regard to be paid to the interests of students, prohibiting any such disposal where this would be detrimental to those interests.²⁶
20. In all these matters the museum would probably be acting on legal advice. Subject to any possible controversy as to whether it owns human remains in its collection, or whether its denial of a return contravenes the Human Rights Act 1998,²⁷ it would probably be able to defend its position effectively in court, should legal proceedings arise. But as far as some claimants are concerned, it might as well be speaking in a foreign language.
21. There are several areas of differential vocabulary. The claimants, if they framed their case in terms of rights of ownership at all, might do so in terms of customary and perhaps communal ownership, rather than in terms of the individual concepts of property and possession familiar to common law. If (as seems likely) claims were based on ties of family or ancestry, the claimants would define those concepts in terms of their own culture, which might of course differ from Western concepts. Even the statutory exception for objects unfit for retention might be construed differently: as enabling disposal on grounds of moral unfitness for retention in the case of indigenous claimants, and as conveying some more limited concession in the eyes of some museums.²⁸ It may mean nothing to the claimants, and do nothing to aid understanding or palliate grief, for them to learn that an alien legal system casts them as non-owners on non-relatives, or fails to regard their grief and the circumstances of the original removal as making their ancestors' remains unfit to be retained. Frustration might even turn claimants towards the courts, in the hope that judges at least would accept their concepts of property and kinship.
22. Modern courts in overseas jurisdictions have shown some sensitivity to such

26 Section 5(1)(c) of the British Museum Act 1963. Section 8(3) provides for the application of *inter alia* section 5 to the Natural History Museum.

27 Appendix 3.

28 Perhaps related to physical deterioration, or to some want of authenticity discovered after the material was received into the collection.

arguments. In the *Mabo* case²⁹ a majority of the High Court of Australia recognised the relevance of indigenous customary concepts of property in determining that Australia was not *terra nullius* before colonisation, and relied on this pre-existing customary native title as the foundation for the discovery of a surviving native title.³⁰ Whether an English court would be similarly receptive to arguments that the question of Aboriginal title to human remains should be determined by Aboriginal customary law is an open question. It may not be possible to exclude the prospect.

A hypothetical case

23. It has been said that litigation is a flawed medium for the resolution of claims concerning cultural objects taken or lost during the Nazi era.³¹ The same, it is submitted, is true of claims for the return of human remains. If anything, the legal traps and voids encountered in a claim for human remains are more formidable, because of the no-property rule and the fact that culturally different concepts are at work between claimant and respondent. These differences are a barrier to amicable resolution. The following passage seeks to trace the likely path of a claim in court.

24. Suppose that an overseas indigenous group seeks recovery of the skeleton of an identified member of its community who died in 1880. It contends that the burial site was excavated without the consent of the deceased person's community in 1890 and that the remains were acquired by an English museum shortly afterwards. It further contends that the spirit of the deceased person cannot rest until he has been reinterred in his home land and that his community is severely distressed and demoralised by his continued incarceration: assertions which the museum has no reason to question and does not question. Members of the group

²⁹ *Mabo v Queensland (No 2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1; cf. *Members of the Yorta Yorta Community v Victoria* [2002] HCA 58.

³⁰ It has been argued that the judicial acknowledgement of customary land title indicates the existence of a more general obligation on the part of the law to protect the culture and heritage of Australian and Tasmanian Aboriginal people: S. Gray, 'Wheeling, dealing and deconstruction: Aboriginal art and the land post-Mabo' *Aboriginal Law Bulletin* 2:56(1992) p 8. And see Sir Anthony Mason AC, KBE, 'First Nations heritage: Land rights and cultural integrity, in (1997) II Art Antiquity and Law 293; Shelley Wright, 'Aboriginal cultural heritage in Australia' *University of British Columbia Law Review* (special issue) (1995) pp 45 at 46 et seq.

³¹ Stephen Weil, 'The American legal response to the problem of Holocaust art', in (1999) IV Art Antiquity and Law 285. See also Palmer, *op. cit.* Chapter 5.

do not know whether the remains were sold or given to the museum or whether the museum's records cast any light on the transaction. The museum has given no information on this point but there is no positive evidence to suggest that it connived at the original disinterment or acted contrary to the standards of the time. The museum is governed by a statute prohibiting the disposal of items vested in the museum and recites that statute as the ground for its refusal to release the remains. It has an informal policy favouring the release of the remains of identified and named individuals to direct surviving lineal descendants, but it sees no evidence of such descent in this case and the group has nominated no such descendant. The group has been pursuing the claim without satisfaction for the past decade and now decides that it has no option but to sue.

25. On what basis should the group found its claim? It might sue at common law for the tort of conversion alleging that, because the remains are the property of the family or community, it has the immediate right to their possession. Conversion is the tort of wrongfully interfering with tangible personal property contrary to the right of a person who has either the possession or the right to possession at the time of the interference.³² The group cannot contend that the museum converted by virtue of the original disinterment because the museum took no part in that (and may not even have existed at the time). It might claim that conversion occurred by virtue of the museum's original acquisition or (more credibly) by the museum's refusal to hand back in response to the group's demand.
26. The museum might defend the claim by arguing that the group has no right to possession because it is a self-appointed claimant having no sufficient authority from the deceased person or his direct family and no other sufficient legal link with the remains. It might alternatively argue that human remains cannot be property, and cannot therefore be the subject of a right to possession or of a claim in conversion; that no sufficient adaptation of the remains has occurred to transform them into property, or that if any such adaptation has occurred it has been performed by and for the benefit of the museum; and that any original right

³² *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, CA.

of possession in the community has been expunged: either by the acquisition of superior right of possession in the museum by virtue of its governing statute, or by the expiry of the limitation period for the bringing of claims.

27. The group might reply that the museum's assertion of 'no property or right to possession' in the group relies on a common law doctrine of property which is alien to the group's own customs, traditions and values, that the common law concept of property is inappropriate in a claim for overseas indigenous remains and should be displaced in favour of the recognition of their customary right, that if there can be no property in human remains then the museum itself has no property and no basis for defence, that if the museum has no property then its governing statute (which is predicated on the vesting of property in the museum) is inapplicable, that the laws on limitation periods relied on by the museum do not apply where the subject matter is not property or chattels or goods, that this is in any event a case where the no-property rule should be displaced to take account of modern conditions, and that such conditions favour the recognition of an appropriate and overriding right of possession and delivery up in the group.
28. The group might seek to strengthen its position by recruiting two further lines of attack: the fundamental guarantees under the Human Rights Act 1998,³³ and the right of personal representatives to delivery up for burial as recently confirmed in the case of *Buchanan v Childs*³⁴. It might try to strengthen its position on the latter point by applying to the overseas court in its home state for appointment as the personal representative of the deceased person. The museum, on the other hand, might contest the right of the group to be treated as the personal representative of the deceased person and might assert countervailing considerations such as the public benefit of continued retention.
29. Of course this does not exhaust the fund of legal argument. Further contentious questions might be:
 - whether the claimant group (possibly an unincorporated association lacking

³³ Appendix 3. ³⁴ See above.

³⁴ See above.

specific corporate identity) has a sufficient status to qualify as an appropriate claimant in law;

- the identification of the system of law which an English court should apply to such issues as the proprietary effect of the various episodes and transactions affecting the remains;
- the evaluation of the effect of any applicable overseas system of law (which would need to be proved as a matter of evidence involving expert witnesses);
- whether the UK government or its national museums occupy a fiduciary position towards Aboriginal peoples (for example, by virtue of the original wrongful taking of their land and other wrongs, the voluntary receipt of human remains contrary to indigenous rights, and the earlier failure to correct those wrongs). A possible result of such argument might be that while legal title (if any) vested in the relevant museums, equitable or beneficial title vested in the claimant groups, towards whom the museums might owe obligations akin to those of a trustee; and
- the timing of any applicable limitation periods and the identification of the legal system whose limitation laws applied.

30 Substantive arguments would be accompanied by procedural manoeuvres. The claimant group would naturally seek disclosure of museum and other records. The museum might seek an order to strike out the claim as having no real prospect of success. The generation and exchange of documents could be formidable, as (it is submitted) would be the potential for further alienation and distress.³⁵

³⁵ Admittedly there are points to be raised in defence of the legal process. A claim in court may be the only way of bringing crucial evidence into the open and of bringing a recalcitrant party to the negotiating table. Recent reforms in court procedure have expedited proceedings and reduced costs, though it is debatable whether these would significantly assist in a claim by overseas indigenous groups for human remains: as one author has said in a different context, museums are not so liberally endowed with funds or time as to contemplate such proceedings lightly. The new Civil Procedure Rules 1998 allow a court to make an order staying (i.e. suspending) court proceedings for a set period in order to allow time for the parties to explore alternative dispute resolution. Such an order may be made either at the court's own instance or on the application of a party.

Validating a voluntary disposal

31. Further legal questions would arise if, at some point in the claims process, the museum decided to release the remains. In that event, the museum's principal concern may be to justify the return in the light of its governing statute. If the statute does authentically prohibit return (which may itself be controversial) the museum will need to seek legal authority to depart from its terms. There are three principal avenues along which a justification might be sought.

Creative interpretation

32. First, a national museum whose governing statute is appropriately framed might, by a process of interpretation, read down the statutory prohibition on disposal and discover, within the language of that prohibition, specific existing authority to dispose of human remains. This might be accomplished by construing the words 'unfit to be retained' as including cases where it is morally repugnant to retain an object. There are some advantages to such a solution. It accords with the position advocated by at least one indigenous group, it would require no statutory amendment or other intervention in the affairs of the museum, and it would enable the deliberation of claims on a case-by-case basis, allowing full scope for the individual merits. But in other respects this appears a narrow and fallible escape route. It is by no means clear that the interpretation can be sustained and it would, in any event, afford relief only in a limited range of cases. No museum has ever accepted the argument and several museums have, by rejecting claims without reference to it, implicitly rejected it as well. Moreover there remains the additional condition of absence of detriment to the interests of students.

*Charities Act 1993*³⁶

33. Secondly, the museum might rely on its status as a charity to invoke certain alleviating provisions in the Charities Act 1993. By section 26 it might seek the consent of the Charity Commission (or even, ultimately, the Attorney-General or the Court) for it to dispose of human remains by way of return to claimants where this would be in the interests of the museum. By section 27 it might seek a similar

³⁶ Note para 268 of the text of this Report (position of the British Museum).

permission where it is convinced that it has a moral obligation to return human remains, even though the return would not be in its interests.³⁷ In either event, a grant of permission would enable the museum to perform acts of return which are contrary to its objects and would not otherwise be lawful in an institution having charitable status. Again, this process has the advantage of requiring no legislative intervention, and of allowing the museum to contain the issue: the process would operate only in relation to a specific case evaluated on its individual merits. The conditions of application are extensive and onerous and we know of no case in which a museum has invoked them to release objects from its collection. A further objection (not universally accepted) is that the Charities Act cannot in any event be invoked to override the statutory prohibitions on disposal contained in its governing Act. A distinguished jurist has doubted the application of section 27 in this context,³⁸ a view which is supported by advice we have received from government legal advisers, though not accepted in other quarters.³⁹ The prospect remains, however, that the Act might be invoked by other museums having charitable status, such as university museums.

Regulatory Reform Order

34. The third possible route to disposal is the use of a Regulatory Reform Order. By section 1(1) of the Regulatory Reform Act 2001, a minister of the Crown may by order (subject to prescribed limits and procedures) make provision for the purpose of reforming legislation which has the effect of imposing burdens affecting persons in the carrying on of any activity, where the object of the provision is inter alia the removal or reduction of any of those burdens. Section 2(1) defines 'burden' to include a restriction, or any limit on the statutory powers of a person. Section 5 imposes a duty of consultation on the relevant minister before making an order, and he or she should make an order where he or she considers it appropriate. The availability of this process to a national museum seeking relaxation of its governing Act to enable the disposal of objects from its collection

³⁷ The conditions necessary to a grant of permission are examined in a paper presented by the Charity Commission to the House of Commons Select Committee on Culture, Media and Sport: Seventh Report, 18th July 2000, Vol. III, Appendix 44, para 8. This document was submitted in the context of Nazi Holocaust-related returns.

³⁸ Sir Anthony Mason AC, KBE, 'Ethical dilemmas for charities: Museums and the conscientious disposal of art', in (2002) VIII Art Antiquity and Law 1 (Lecture delivered at the Institute for Philanthropy, University College London, 1 October 2002).

has been doubted by a learned commentator.⁴⁰ We further understand that there exists a long queue for such Orders and that the process is now likely to take as long as primary legislation.

39 The British Museum reserves its position on this point: see para 268 of the text of this Report.

40 Sir Anthony Mason AC, KBE, 'Ethical dilemmas for charities: Museums and the conscionable disposal of art', in (2002) VIII Art Antiquity and Law 1.

Appendix 3: Repatriation of Human Remains and the Human Rights Act

Executive Summary

- An important element in the beliefs and culture of most peoples is that the remains of their dead should be accorded proper respect and treatment. For many indigenous peoples this means that the remains of their dead should be repatriated to their country of origin so that the soul of the deceased will finally find rest. The repatriation of human remains of indigenous peoples is not only seen as a spiritual necessity but essential to the preservation of their culture and way of life. Furthermore, many such peoples harbour a continuing sense of grievance at the way in which the human remains of their ancestors were removed from their resting places. Repatriation is seen as a way of redressing past injustices and of allowing a healing process to begin.
- There are a number of preliminary issues that need to be addressed before considering the liability of museums for claims for enforcement of Convention rights under the Human Rights Act 1998 (HRA). These are the liability of museums as ‘public authorities’, the territorial scope of the HRA, who is to be regarded as a ‘victim’, whether the claim might be time-barred, and the consequences where a museum is bound by statute to act in a particular way.
- For the purposes of the HRA, museums that are governed by statute, or which rely on public funding, are likely to be regarded as ‘public authorities’ and thus proceedings can be brought against them to enforce Convention rights. The status of other museums would depend on their constitutions and whether they could be considered as performing a public function. But even where the museum constitutes a private authority the courts themselves are ‘public authorities’ under the HRA and are required to uphold Convention rights. Although the extent to which this would give an individual the right to enforce a Convention right against such a museum is far from settled, the possibility cannot be excluded.

- The HRA is not limited to the protection of the Convention rights of persons living in the UK.
- Only persons directly affected by a breach of a Convention right can bring proceedings as a 'victim'. Although the dead cannot be said to possess human rights, the manner in which the remains of the dead are treated could affect the human rights of the living. The concept of 'victim' could arguably include not just close relatives but an indigenous people who may be affected by the breach of Convention rights. Representatives of such people are likely to have standing as victims to bring proceedings under the HRA.
- The HRA excludes claims brought against public authorities where the wrong alleged took place prior to the entry into force of the Act. However, a claimant could argue that the retention of human remains is a continuing wrong and that time should run from when a request for their return has been made and refused.
- Where a museum is prevented by statute from disposing of human remains it would be the duty of the court to interpret the relevant statutory provisions as far as possible consistently with Convention rights. If this were not possible it would be open to the court to make a declaration of incompatibility. Although this would not have an immediate effect on the case before the court, such a declaration would place the Government under strong pressure to amend the offending legislation.
- A refusal to repatriate the human remains of an indigenous person could bring into play Article 3 of the Convention (protection against inhuman or degrading treatment). The prohibition is an absolute one. However the level of humiliation or debasement must attain a certain degree of severity before Article 3 is breached. What constitutes inhuman or degrading treatment must be judged by the standards of those suffering such treatment.

- The right to respect for family and private life guaranteed by Article 8 of the Convention could include protection of the way of life of an indigenous people, including a requirement to respect for their traditions in the matter of the disposal of the remains of their dead. Interference with this right would be justified only if it pursued a legitimate aim and was necessary and proportionate.
- The deeply held beliefs of an indigenous people with regard to the disposal of the remains of their dead are likely to constitute a manifestation of their religion or belief guaranteed by Article 9 of the Convention. A refusal to repatriate remains could breach Article 9 unless it was justified in the public interest and was necessary and proportionate. Each case needs to be considered on its merits, and the right of an indigenous people to the return of the remains in question balanced against the public interest served by their retention.
- The protection from discrimination guaranteed by Article 14 of the Convention is not freestanding. It only comes into play in relation to the enjoyment of the other rights and freedoms guaranteed by the Convention. Discrimination requires that persons in similar or analogous positions should be treated differently. It could be argued that the favourable treatment accorded to relatives of persons who die in hospital regarding the disposal of human organs and tissue contrasted with the restrictive and unsympathetic attitude of some museums when it comes to the retention of human remains in their custody amounts to discrimination.
- Given the wide interpretation of the term 'possession' in Article 1 of the First Protocol a right to the return of human remains could constitute a possession and a refusal to return the remains could infringe the right to peaceful enjoyment of one's possessions. A museum would need to show that the retention of the remains was justified in the public interest and proportionate.
- Conversely, imposing a requirement on museums to return remains could infringe the museum's right to retain custody of the remains, which could constitute a possession. But where a museum is a public authority it would not be considered

- a victim for the purpose of bringing proceedings under the HRA. In the case of other museums, interference with the museum's rights could be justified in the public interest of treating indigenous peoples fairly by repatriating their human remains. However, compensation, perhaps only nominal, might be payable.
- The continued retention by a museum of artefacts of significant religious or cultural importance could amount to a denial of an indigenous people's right to maintain their culture or to manifest their religion, thus engaging Articles 8 and 9 of the Convention. Were a museum to adopt a discriminatory policy and return some artefacts and not others then a breach of Article 14 might also arise. It would be for the museum to justify the retention of such artefacts using arguments of public interest, proportionality etc. A further factor is that, unlike the case of human remains, the museum is likely to be the legal owner of the artefact and would arguably have a greater claim to retention of the artefact.
 - The Convention is a living instrument and the European Court (and a UK court) in considering the application of the Convention to the issue of repatriation of human remains is likely to have regard to relevant international legal instruments, including the draft UN Declaration on the Rights of Indigenous Peoples, as well as to state practice.
 - The law in this area is so far untested. Whether a challenge would be successful would depend on the circumstances of the case at the time. Some of the arguments are likely to be stronger than others. The Courts so far have tended to take a fairly restrained view when it comes to human rights challenges. On the other hand, the issue of repatriation of human remains is capable of arousing strong feelings on the part of indigenous peoples and others and the climate of international opinion on this question is undoubtedly changing. Since the Convention is a 'living instrument' there is no guarantee that arguments that might seem overambitious or of little real substance today would not have greater weight in the future.

Introduction

1. This paper examines the question of how the Human Rights Act 1998 (HRA) could provide the basis for a claim against a British museum for the repatriation of human remains in the custody of the museum by descendants or representatives of an indigenous people. It also considers whether a museum would have any claim against HM Government in the event that the museum were forced through legislation, or otherwise, to repatriate human remains in its custody.

2. An important element in the belief and practices of most cultures of the world is that proper respect should be accorded to the remains of the dead. Within most cultures the disposition of the dead is handled with ceremony, humanity and dignity. In many religions the souls or spirits of the departed live on and burial practices are designed to facilitate the deceased's passage into the afterlife. For many indigenous peoples, for example the Native American and Australian Aboriginal communities, the relationship of the ancestors to the land and to their own community is central to their religious belief. The removal of human remains in the past from graves and other places of burial is regarded as highly offensive, has left a deep feeling of injustice, and has been detrimental to the spiritual and physical well-being of the whole community.

3. Some sense of the strength of feeling that the retention of human remains by museums and other institutions in the UK arouses can be ascertained by the evidence that representatives of a number of indigenous peoples gave to the Select Committee on Culture, Media and Sport (Select Committee) and to the Working Group on Human Remains. In the submission to the Culture, Media and Sport Committee the representative of the Chitimacha tribe of Louisiana, referring to the remains of two females from that tribe in the Natural History Museum, stated:

They are our ancestors. We need to put them to rest. Their spirits will not be at rest until they are home, and safely placed back in the earth where they belong, resting for eternity. It is unconscionable that our ancestors have been placed in boxes on shelves, put on display in cases, handled and examined for research purposes, knowing that they remain in a state of

unrest.¹

The memorandum submitted to the Select Committee by the Government of Australia stated:

The treatment of indigenous human remains historically is a poignant reminder of instances of harsh treatment of indigenous Australians as a consequence of European settlement. Therefore, the issue of the return of these remains to their traditional custodians and places of rest is extremely important to indigenous people and is seen by many as a means of addressing past injustices. The cultural and historical significance of indigenous human remains combined with personal feelings of attachment to ancestral remains underpins the sensitivity of this issue to indigenous people. On the return of ancestral remains a community can satisfy its spiritual needs and the cultural imperative to see that the dead have been treated with due respect and ceremony. In many cases the remains are buried according to custom in a place designated by the community.²

The minutes of evidence to the Select Committee by the Foundation for Aboriginal and Islander Research Action stated:

The pre-eminent rights of Aboriginal and Torres Strait Islander communities over their human remains and cultural property are an essential prerequisite for the exercise of basic human rights and fundamental freedoms. The rights to freedom of religious expression and practice and the importance of control over cultural

¹ Culture Media and Sport Committee, Seventh Report, Vol III p 291.

² Ibid., p 381.

heritage to the identity and future of indigenous people are fundamental.³

4. It is evident from the above that repatriation of human remains to the land of their ancestors is seen by indigenous peoples as not only a spiritual necessity but also an essential element in the preservation of their culture and way of life. Furthermore, many communities continue to harbour a deep sense of grievance at the way in which the remains of their ancestors were removed from their resting-places. The repatriation of their remains will redress past injustices and ‘allow communities to begin a healing process that transcends beyond just reburying the remains’.⁴ These factors need to be borne in mind in considering possible challenges under the HRA.
5. This paper is in two parts. The first part deals with the question of whether a claim could be brought under the HRA (based on the law as it currently stands). It deals with the following preliminary questions:
 - the possible liability of museums as ‘public authorities’;
 - the territorial scope of the HRA;
 - whether the claimant would be a ‘victim’ for the purposes of the HRA;
 - whether the claim would be time-barred; and
 - the consequences if the museum is statutorily bound to act in a particular way.

Assuming that a claim could be brought and that a court would have power to order the repatriation of the remains, the second part focuses on the Convention rights that a claimant might seek to rely on and the arguments that a court would be bound to consider.

³ Ibid., Vol. II p 89.

⁴ Supplementary Submission of ATSIC to HRWG of February 2002.

Part I – Could a claim be brought under the HRA?

Museums as public authorities

6. It should perhaps be pointed out that this paper is not intended to be relied upon by individual museums in considering whether they would be caught by the Act, but is intended to highlight that the issue of whether a museum is a public authority is one of the first issues that a court would be required to adjudicate in any claim under the HRA for the repatriation of remains.

7. S.6 of the HRA provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right,⁵ except where as a result of one or more provisions of primary legislation the authority could not have acted differently, or such legislation cannot be read or given effect to in a way which is compatible with Convention rights.

8. S.6(3) provides that the term ‘public authority’ includes, (a) a court or tribunal, and (b) any persons⁶ ‘certain of whose functions are of a public nature’ but not including either House of Parliament or persons exercising functions in connection with proceedings in Parliament. S.6(5) further provides that in relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

9. Although the HRA does not contain any further definition of the term ‘public authority’, it is clear from s.6(3)(b) that it covers not only authorities that are clearly organs of the state, such as government departments, police officers, prison officers, immigration officers, local authorities etc., but also includes bodies that are not manifestly public authorities, but some of whose functions are partly of a public nature. In the passage of the Bill through Parliament Railtrack.

⁵ The term ‘Convention right’ is defined in s.1 of the HRA as the rights and fundamental freedoms set out in Articles 2 to 12 of the European Convention on Human Rights (the Convention), and Articles 1 to 3 of the First Protocol, and Articles 1 and 2 of the Sixth Protocol, as read with Articles 16 to 18 of the Convention.

⁶ In accordance with normal rules of interpretation the term ‘persons’ includes both natural and legal persons.

was given as an example of a body with a mixture of public and private functions. When carrying out functions relating to its statutory obligations with regard to safety, it would qualify as a public authority. But when carrying out its functions as, for instance, a property developer, it would not so qualify.⁷ Other examples might be the case of a private security company exercising public functions in relation to the management of a contracted-out prison but acting privately when guarding commercial premises, or doctors in general practice who would be public authorities when carrying out their NHS functions but not in relation to their private patients.

10. It is clear that the Government intended the meaning of ‘public authority’ under the HRA to correspond with the notion of state responsibility under the Convention. In the House of Commons the Home Secretary said: ‘The principle of bringing rights home suggested that liability in domestic proceedings should lie with bodies in respect of whose actions the United Kingdom Government was answerable in Strasbourg.’⁸ This does mean that the acts of individuals are capable of engaging state responsibility where, for example, the state has delegated its responsibilities to private individuals. In *Costello-Roberts v UK*⁹ the European Court found that corporal punishment by the headmaster of an independent school engaged state responsibility under the Convention.
11. Since the notion of public authority embraces all organisations capable of engaging the state responsibility of the UK, liability for a breach of Convention rights extends widely. According to the Home Secretary:

‘Under the Convention, the Government is answerable in Strasbourg for any acts or omissions of the State about which an individual has a

⁷ See Lord Williams, HL Debs. col. 758, 24 November 1997.

⁸ HC Debs. cols. 406 and 408, 17 June 1998. Parliamentary statements can of course be used by the courts in construing legislation in accordance with the principles in *Pepper v Hart* (1993) AC 593.

⁹ (1995) 19 EHRR 112.

responsibility for core bodies, such as central government and the police, but it also has a responsibility for other public authorities in so far as the actions of such authorities impinge on private individuals.

The [HRA] had to have a definition of public authority that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies and charities, have come to exercise functions that were previously exercised by public authorities . . . It was not practicable to list all the bodies to which the [HRA's] provisions should apply. What was needed was a statement of principle . . . [s.6(3)] therefore adopts a non-exhaustive definition of a public authority'.

12. In view of the wide notion of public authority under both the HRA and the Strasbourg jurisprudence the question arises whether a museum would be regarded as a public authority for the purposes of the HRA. Museums would fall into one of the following three categories:
- (a) A 'core' public authority, such as an organ of central or local government;
 - (b) An authority that carries out a mixture of functions, some of which are public and some of which are private. As a result of s.6(5), only those functions that are of a public nature will be caught by the Act; or
 - (c) A private authority that is not caught by the Act per se. Such authority may nevertheless still be caught by the Act (see paragraph 13 below).

The question into which category a museum should fall depends on a number of factors, such as whether it is run solely as a commercial enterprise, whether its functions in terms of its charter include public functions such as the education of the public, whether it is in receipt of public funding, whether its functions are regulated by statute etc. Most museums are in receipt of public funding, registered with Resource and are non-profit-distributing. Moreover, their charters are likely

to include as their principal objective the placing of objects on public exhibition for the education of the public – an essentially public function. The activities of some, such as the British museum, are regulated by statute and the statute will set out specifically the activities and obligations of the museum. However, a museum is also likely to be engaged in a number of commercial operations, such as selling souvenirs, providing refreshments, mounting special exhibitions etc. The case of each museum would need to be considered individually, but it is submitted that a museum which is in receipt of public funding and/or has its activities regulated by statute, or performs a public service, is likely to fall within category (b)¹⁰ Furthermore, given that any claim for the return of human remains would be a claim against the museum in respect of functions performed by it of a public nature, and having regard to the arguments likely to be relied upon by the museum justifying retention, it would probably be regarded as a public law claim rather than a private law claim.

13. In those cases, likely to be few in number, where a museum falls within category (c) the museum might still be required to act consistently with Convention rights. S.7(1)(b) of the HRA provides that in addition to proceedings against a public authority, Convention rights may be relied upon in ‘any legal proceedings’. Under the doctrine of ‘positive obligations’ as developed by the jurisprudence of the European Court, States Parties to the Convention are obliged in certain circumstances to protect the Convention rights of individuals¹¹ where those rights are violated by other individuals. The extent of a State’s obligation to protect the rights of individuals depends on the character of the Convention right engaged and the seriousness of the breach. This obligation would include the case where fundamental rights such as those in articles 2 and 3 were at stake¹¹ or where intimate interests such as those protected by article 8 were at stake. or where

¹⁰ The question of whether a ‘hybrid’ body was a public authority for the purposes of the HRA was considered by the House of Lords in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley v Wallbank* [2003] 3WLR 283. Lord Nicholls said that in determining whether a such a body was exercising a public function factors to be taken into account included ‘the extent to which in carrying out the relevant function the body was publicly funded, or was exercising statutory powers, or was taking the place of central or local authorities, or was providing a public service’.

¹¹ See *Costello-Roberts v UK* (1993) 25 EHRR 112.

intimate interests such as those protected by article 8 were at stake.¹² Under the HRA the courts as ‘public authorities’ are obliged to protect Convention rights effectively. It is far from settled how far this would give the courts power to intervene to protect the rights of individuals against the actions of other individuals (i.e. ‘horizontal’ claims). There is some authority for the proposition that the courts can intervene in this way. In *Re Crawley Road Cemetery*¹³ a Consistory Court held that under s.6 of the HRA it was obliged as a public authority not to act in a way that was incompatible with the petitioner’s rights under article 9 of the Convention (in this case the petitioner’s freedom to manifest her religion by ensuring that her husband’s remains were not interred in consecrated ground). It is possible too that since the judgment of the Grand Court in the case of *Hatton and others v UK*, where the Court found that the UK was in violation of article 13 because the applicants were unable to secure redress by judicial review, the English courts would be prepared to admit ‘horizontal’ claims under the HRA in those cases where the United Kingdom has an obligation to secure the Convention rights of individuals against violation by other individuals. Although each case would have to be considered on its merits, the possibility of an action being brought against a private museum by an individual or group of individuals relying on the duty of the court as a public authority to protect a Convention right cannot therefore be ruled out, even in circumstances where the action, apart from the Convention right relied upon, would not otherwise have succeeded.

¹² See *Lopez Ostra v Spain* (1995) 20 EHRR 277 and *Hatton and others v UK* (2002) 34 EHRR 1. Although the Grand Chamber has since ruled that on the facts the UK was not in violation of Article 8 (judgment of 8 July 2003), the finding that the UK was under a duty to protect an individual’s rights under article 8 was reaffirmed. Furthermore, the inability of the applicants to secure redress in the English courts by way of judicial review constituted a violation of Article 13 (right to an effective remedy).

¹³ (2002) 2 WLR 1175. A failure to provide redress would also violate Article 13; see *Hatton v UK* referred to above.

Territorial scope

14. Under Article 1 of the European Convention on Human Rights, the States Parties guarantee the rights and freedoms defined in the Convention to everyone within their jurisdiction.¹⁴ It is clear from the case law of the Court that the concept of jurisdiction is not restricted to the national territory of a state. *The Loizidou case*¹⁵ held the Government of Turkey responsible for the actions of the so-called Turkish Republic of Northern Cyprus relating to the seizure of property in Northern Cyprus. It therefore follows that where the action of a public authority in the UK violates the human rights of persons outside the UK those persons would have the right to bring proceedings under the HRA.

The requirement that the person invoking Convention rights be a 'victim'

15. As a preliminary point, if only to dismiss it, it is perhaps necessary to consider whether the concept of 'human rights' can in any way include the rights of those who are dead. The notion is not quite so fanciful as may seem at first sight. Most religions believe that a human being has a soul or spirit that lives on after death. Some cultures and religions attach particular importance to the way in which the human body is treated after death and if the body is not given the proper treatment required by the culture or religion of the deceased the soul or spirit of the deceased will not find rest. Failure to accord the body of the deceased proper respect and treatment according to the traditions of the deceased's culture or religion is considered to amount to a continuing violation of the deceased's rights. Unfortunately, so far as the law is concerned, such a notion is difficult to sustain. The very concept of 'human rights' is to accord fundamental rights and freedoms to the living. There is nothing in the Strasbourg jurisprudence that lends support to the notion that a person's human rights continue after death. The only exception to this, which is not relevant here, is where a violation of the right to

¹⁴ Articles 1 and 13 (effective remedy for violation) are not scheduled to the HRA because it was not considered necessary to do so as the HRA itself guaranteed Convention rights and provided an effective remedy for violation.

¹⁵ *Loizidou v Turkey (Preliminary objections)* (1995) 20 EHHR 99.

- life is alleged. In those circumstances the court will admit actions brought by the close relatives of the deceased. The case of *X v Federal Republic of Germany* referred to in paragraph 33 below concerned the right of a living person to decide on the manner of the disposal of his remains after death and so is not relevant to this argument.
16. Under s.7 of the HRA a person who claims that a public authority has acted unlawfully may only bring proceedings against the authority or rely on Convention rights in any legal proceedings if he/she is (or would be) a victim of the unlawful act. S.7 further provides that in any proceedings for judicial review an applicant would have sufficient interest only if he/she is (or would be) a victim. For the purposes of s.7 a person is considered a victim if he/she would be a victim for the purposes of Article 34 of the Convention.
17. Article 34 provides for the Court to receive applications from ‘any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto’. ‘Person’ includes legal persons. In general a ‘victim’ must be someone directly affected by the unlawful act alleged. The European Court thus has no jurisdiction to review national law or practice *in abstracto*. Accordingly, representative actions are not permitted. However, an organisation has capacity to bring an action where the organisation bringing the proceedings is either itself directly affected or genuinely represents individuals who have been directly affected.¹⁶ On the same basis, the reference to a ‘group of individuals’ in Article 34 would also permit an unincorporated association to bring an action. The Court will also admit actions brought by the close relatives of a deceased person where it is alleged that the relatives themselves are victims of a violation.¹⁷

¹⁶ See *Open Door Counselling and Dublin Well Woman v Ireland* (1993) 15 EHHR 244 and *Times Newspapers Ltd v UK* (1990) 65 DR 307. Also, a church body or association with religious or philosophical aims is capable of possessing and exercising the right to freedom of religion since the application by such a body is in reality lodged by its members (see *Hautamäki v Sweden* (1996) 22 EHHR CD 155).

¹⁷ See *Nölkenbockhoff and Bergemann v Federal Republic of Germany*, 12 December 1984 (1985) 40 DR 80.

18. In the context of possible claims under the HRA for the repatriation of human remains, an organisation or unincorporated association representing an indigenous people would have standing to bring an action to enforce a Convention right provided it represented persons who were themselves directly affected by the violation of their Convention rights. Whether they were directly affected would of course depend on the circumstances of the case and what rights were alleged to have been violated. In the first place, the claimants must establish that it is their rights (e.g. their right to respect for private and family life or for freedom of religion), as opposed to the rights of persons who are deceased, which have been affected. They must then establish that they have a sufficiently close relationship with the deceased to qualify as victims. Close relatives (such as children or grandchildren) who are able to establish that they are directly affected by the violation are likely to have standing as ‘victims’. In cases where the human remains have been in the custody of a museum for a considerable number of years it may be difficult for the descendants of the deceased to establish they have a sufficiently close relationship as relatives to qualify as victims, unless a court can be persuaded to consider the matter in the light of the culture and traditions of the indigenous people of which the relatives are members, where notions of family and kinship may be far more extended than in Western culture. However, it is not only relatives of the deceased who may qualify as ‘victims’. As discussed later in this paper (paras 26 and 29) an identifiable group of persons could also qualify as a ‘victim’ if it could be shown that their Convention rights as a group had been violated.

Would any claim under the HRA be time-barred?

19. The HRA does not in general have retrospective effect. Except where proceedings are brought by or on behalf of a public authority no proceedings can be brought under s.7 where the act complained of took place before the coming into force of that section¹⁸ Where the act complained of took place

¹⁸ S. 22(4) HRA.

after the entry into force of s.7 then proceedings must be brought within one year of the date on which the act complained of took place (or such longer period as the court or tribunal considers equitable having regard to all the circumstances).¹⁹

20. If a museum has only recently come into possession of the human remains and a request for their repatriation has been refused within the last 12 months then the time limit will not be an issue. However in most cases the remains are likely to have been in the possession of the museum for many years. The question then arises as to what is the act complained of and when did it take place. If the act complained of was the original acquisition of the remains by the museum or the introduction of a policy on the part of the museum to refuse requests for repatriation, either of which took place prior to the entry into force of the Act, then clearly proceedings challenging that act would be inadmissible. However a claimant is likely to argue that the retention of human remains is a continuing breach and that time should run from the time that a request for repatriation was made and refused (assuming that the request and refusal were made after the entry into force of the HRA). In most cases therefore the question of the time limit is unlikely to be an issue. Nor is it likely to be an issue where a claimant brings proceedings against a museum not as a public authority but relying on the court itself as a public authority to uphold the claimant's Convention rights under the doctrine of 'positive obligations' referred to in paragraph 13 above.²⁰

The position of museums governed by statute

21. In the case of the British Museum, the British Museum Act 1963 prohibits the museum from disposing of any of its collection, except in certain specified cases. Other museums regulated by statute have similar constraints. The obligation on public authorities under s.6 of the HRA to act in a way compatible with Convention rights does not apply where the authority is constrained by statute.

¹⁹ s.7 (5) HRA.

²⁰ 22(4) of the HRA excludes claims against public authorities under s.7(1)(b) where the act complained of took place before the entry into force of that section.

However s.3 of the HRA provides that so far as it is possible to do so primary legislation and subordinate legislation must be read and given effect to in a way which is compatible with Convention rights. If a court were minded to take the view that the retention of human remains by a museum breached one or more Convention rights it would endeavour to construe the legislation governing the museum so that it gave effect to those Convention rights. In the case of the British Museum, for example, s.5(1)(c) of the British Museum Act permits the Trustees to dispose of objects in its collection that are 'unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students'. A court could be invited to interpret the phrase 'unfit to be retained' as embracing remains the retention of which would be contrary to a Convention right. Alternatively, since it is generally accepted law that, apart from a number of limited exceptions, no property exists in human remains, a Court could be invited to take the view that human remains in the custody of a museum are not part of the museum's 'collection'.

22. Section 4 further provides for a court to make a declaration of incompatibility if it is satisfied that a provision of primary legislation is incompatible with a Convention right. In the case of a museum constrained by statute from disposing of its collection, if a court were to reach the view that the retention of human remains would be incompatible with a Convention right, then in the event that the court were unable to interpret the relevant provisions of the legislation consistently with that Convention right, a declaration of incompatibility could be made. However, s.4(6)(a) expressly states that the declaration has no effect on the validity or continuing operation of the provision. Section 4(6)(b) makes clear that the declaration is not binding on the parties in the proceedings in which it is made. A declaration of incompatibility would not be of any immediate benefit to the claimant and the court would still have no power to return the remains. Nevertheless a declaration would put the Government under strong pressure to amend the provision in a way that would remove the incompatibility.²¹

Part II – Convention rights

23. Leaving aside the procedural hurdles that may need to be overcome, there are a number of Convention rights that could come into play in considering the vulnerability of museums under the HRA in connection with the repatriation issue. These include: the prohibition of inhuman and degrading treatment (Article 3); the right to respect for private and family life (Article 8); the right to freedom of thought, conscience and religion (Article 9); the prohibition of discrimination (Article 14); and the protection of property (Article 1, First Protocol).

The prohibition on inhuman and degrading treatment

24. Article 3 of the Convention stipulates that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The prohibition is an absolute one. It could be argued by a claimant representing an indigenous people that the public display of human remains, or the keeping in storage without proper funeral rites, of an identified person or of a person who was a member of an indigenous people amounts to the infliction of inhuman or degrading treatment on that people. However, as noted above, it would not be open to the relatives of the deceased to bring an action in respect of inhuman or degrading treatment inflicted on the deceased (which in many cases is likely to have been inflicted long before the Convention came into existence).

²¹ Under s.10 and Schedule 2 of the HRA there is a 'fast track' procedure for amending legislation in respect of which a declaration of incompatibility has been made. Subject to the procedural requirements of Schedule 2, power is given to a Minister of the Crown to amend the legislation by order to remove the incompatibility.

25. In order to qualify as inhuman or degrading treatment the conduct must ‘attain a minimum level of severity’.²² The guidelines given by the European Court in the *Ireland v UK* case are in the case of inhuman treatment that the treatment ‘causes intense physical and mental suffering’ and in the case of degrading treatment that the treatment ‘arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibly breaking his or her physical or moral resistance’. Thus the defining feature of degrading treatment is the element of humiliation or debasement, and the threshold of severity would require that the humiliation be gross. The presence of a deliberate intention to inflict degrading treatment would be an aggravating feature but the absence of such intention would not rule out a violation of Article 3. In *Peers v Greece*²³ the Court held that ‘although the question whether the purpose of the treatment was to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3’.
26. The Human Rights Commission and the Court have had occasion to consider whether degrading treatment could be inflicted on a group of people. In the *East African Asian* cases the Commission found a violation of Article 3 on the basis that the practice of refusing to allow British passport holders who had been expelled from Uganda, Tanzania and Kenya to take up residence in the UK amounted to institutionalised racism.²⁴ In *Cyprus v Turkey* the Court found that Greek Cypriots living in the Kapras area of northern Cyprus had been subject to discriminatory treatment which attained a level of severity amounting to degrading treatment. Apart from showing that discrimination could amount to a breach of Article 3, these cases are instructive in that the Commission and Court appeared to have no difficulty in accepting that an identifiable group of persons could be the victims of degrading treatment.²⁵ Apart from showing that discrimination could amount to a breach of Article 3, these cases are instructive in

²² *Ireland v UK* (1979-80) 2 EHHR 25 at para 162.

²³ (2001) 33 EHHR 1192.

²⁴ *East African Asians v UK* (1981) 3 EHHR 76.

²⁵ (App. 25781/94), Judgment of 10 May 2001, paras 302-11.

that the Commission and Court appeared to have no difficulty in accepting that an identifiable group of persons could be the victims of degrading treatment.

27. The question of whether relatives or representatives of an indigenous people could succeed in claiming a violation of Article 3 would clearly depend on the circumstances of each case. The basis for such a claim is likely to be that the continued retention by the museum of the remains of their ancestors in circumstances that offend their deeply felt religious sensibilities amounts to the infliction of inhuman or degrading treatment on them. One hypothetical example of an analogous situation might be the case of a cemetery that decided to sell off part of its land and in order to prepare for the sale disinterred the remains of those who were buried on the site. Instead of treating the remains with proper respect they were placed together in plastic bags and disposed of by incineration. If a cemetery were to behave in such a way it would clearly cause immense distress to the relatives whose loved ones had been buried on the site and arguably would amount to inhuman or degrading treatment inflicted upon the relatives. Among some religious cultures, such as Judaism, respect for the sanctity of human remains is paramount. In Israel great care is taken to ensure that archaeological excavations do not disturb human remains, however long they may have been interred. In the UK the response from the Jewish community to the excavation at Jewbury in York was one of shocked outrage, accompanying demands for immediate reburial and cessation of further archaeological activity. Given the strong feeling among many indigenous peoples about the way in which the remains of their ancestors have been treated by museums their distress may be as great as that of the relatives or the Jewish community in the examples given. However, to be successful a claimant would have to show not just that the treatment was humiliating or debasing but that its severity was so gross as to bring into play Article 3. This is a high threshold and many cases may fail to mount it. Nevertheless, it should be borne in mind that the degree of humiliation or debasement has to be judged not against Western standards but against the culture and religious sensitivities of those actually suffering such treatment. It should also be borne in mind that the Convention is a 'living instrument', and conduct found by the Commission and Court in the past as falling below the level of severity for

Article 3 may have to be reconsidered in future cases.²⁶ While therefore it might be argued today that the treatment was not of such severity as to breach Article 3, it is possible that in the light of developing international standards and climate of opinion a court might at some future stage hold that the threshold of Article 3 had been breached.

Respect for private and family life

28. Article 8(1) provides that ‘everyone has the right to respect for his private and family life, his home and his correspondence’. Article 8(2) prohibits public authorities from interfering with this right except where: (a) the grounds for interference are ‘in accordance with law’; (b) they pursue a legitimate aim (e.g. protection of health and public safety, protection of the rights of others); and (c) they are necessary and proportionate.
29. It is difficult to envisage circumstances where the treatment of remains of the ancestors of an indigenous people could amount to interference with the right to family life, even taking the wider concepts of ‘family’ that may prevail among indigenous peoples. The right to respect for a family life is concerned with protecting the right of family members to live together and form relationships – concepts that do not seem relevant here. However Article 8 extends both to family life and to ‘private life’. The Strasbourg jurisprudence has interpreted Article 8 as capable of extending to the lifestyle of particular communities. The case of *G and E v Norway*²⁷ concerned the effects of the construction of a dam in Lapland. The applicants were members of the Lapp community who had traditionally used the lands for herding, fishing and hunting. The Commission observed that ‘under Article 8, a minority group is, in principle, entitled to claim the right to respect for the particular lifestyle it may lead as being “private life”, “family life”, or “home”’ *Buckley v UK*²⁸ the case concerned the refusal of planning permission for the applicant, a Gypsy by birth, to station caravans on her land. The Commission

²⁶ See *Selmouni v France* (2000) 29 EHRR 403, para 101 of judgment.

²⁷ Apps 9278/81 and 9415/81 DR 35 (1983) 30-45.

²⁸ App. 20348/92. Commission Report adopted 11 January 1995, Judgment of the Court delivered 25 September 1995.

stated that the applicant had a right to a home – an autonomous concept that did not depend on classification by domestic law. The cases of *G and E v Norway* and *Buckley v UK* were found inadmissible by the Commission and the Court respectively, on grounds that the measures adopted by Norway and the UK pursued a legitimate aim and were necessary and proportionate. However, these cases are authority for the proposition that an interference with the lifestyle of a group of people is capable of engaging Article 8.

30. In light of the strong views expressed by a number of indigenous peoples that the repatriation of the human remains of their ancestors is fundamental to their way of life and/or culture, it is arguable that the continued retention of those remains by museums violates Article 8. The burden would then lie with the museum to justify their retention on the grounds specified in Article 8(2).

Freedom of thought, conscience and religion

31. Article 9(1) provides that everyone has the right to freedom of thought, conscience and religion. This right includes the freedom to manifest one's religion or belief, in worship, teaching, practice and observance. The right to freedom of thought, conscience and religion is absolute. However, under article 9(2) the right to manifest one's religion or belief is subject to such limitations as are prescribed by law in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
32. A narrow approach has been taken to the question of the right to manifest one's religion or belief. In this respect the European Court and Commission have sought to distinguish between conduct which directly expresses religious belief (protected) and conduct which is merely motivated by religion or belief (not protected). An example of the former might include eating Kosher food, or the caste Sikhs should not be required to clean floors. Examples of the latter would include distributing pacifist leaflets,³⁰ non-payment by Quakers of taxes used for right of female followers of Islam to wear a veil. In *X v UK*²⁹ the Commission

accepted that the applicant had established that his religion required that high-defence purposes,³¹ and advertising a religious artefact used by Scientologists.³²

33. The case of *X v Federal Republic of Germany*³³ is relevant in the present context. The Commission considered the admissibility of a claim alleging breaches of Article 8 and Article 9 on grounds that the applicant was denied the right to practise his religious belief by having his ashes scattered on his own land after his death and was obliged to be buried against his personal conviction in a cemetery with Christian symbols. The Commission observed that the applicant was not obliged to have a religious funeral and tomb with Christian symbols and he was free to have his tomb decorated according to his personal wishes. Article 9(1) did not confer on him the right to prevent other people from individually decorating their tombs in a public cemetery with religious symbols. The Commission expressly said that ‘it remains to be determined whether or not the applicant’s wish to be buried on his own land according to his religious beliefs is protected by Article 9(1) as being the manifestation of a belief in practice’. The Commission case the legislation gave everyone a certain freedom in choosing the means of his burial but that the German legislation on cemeteries generally considered that the applicant’s wish to be buried on his own land could not be considered as a manifestation of belief in practice ‘in the sense that some coherent view on fundamental problems can be seen as being expressed thereby’. The Commission noted however that the right of persons to choose the place and determine the

29 (1982) 28 DR 5.

30 *Arrowsmith v UK* (1980) 19 DR 5

31 *C v UK* (1983) 37 DR 142.

32 *X and the Church of Scientology v Sweden* (App. 7805/77) 5 May 1979 (1979) 22 Yearbook 244.

33 (1981) 24 DR 137.

modalities of their burial was so closely related to private life that it comes within the sphere of Article 8. The Commission found that in the present forbids the burial of corpses and crematorial ashes outside cemeteries. The legislation was intended to protect public interests, having regard to such factors as securing a peaceful resting place for human remains, an adequate treatment of corpses and crematorial ashes, the protection of public health and public order and also urban and road planning. For these reasons the Commission did not consider that there had been a violation of Article 8. In other words, the Commission accepted that there had been some interference with the applicant's right to respect for his private life but in the circumstances that interference was proportionate.

34. As noted, the Commission expressly left open the question whether the applicant's wish to be buried on his own land according to his religious beliefs fell within the scope of Article 9. In *X v Federal Republic of Germany* the Commission was undoubtedly influenced by the fact that the applicant was able to manifest his belief by exercising the option not to have a religious funeral and for his tomb to be decorated according to his personal wishes. And the fact that the Commission considered the German legislation prohibiting burial outside cemeteries as not unreasonable was also an important factor.
35. The case of *X v Federal Republic of Germany* should be contrasted with the case of *Re Crawley Green Road Cemetery*.³⁴ That case concerned an application for a faculty to disinter ashes that had been mistakenly buried in consecrated ground. The applicant and deceased were humanists and the applicant had a fundamental objection to the ashes of the deceased being interred in consecrated ground. Without hearing any opposing arguments, the Consistory Court of its own initiative granted the faculty on the grounds that to refuse it would infringe the applicant's right under Article 9 of the Convention to manifest her religion.

34 [2002] 2 WLR 1175.

36. The question arises whether a genuinely held belief by a person, or group of persons, that their religion a manifestation of religion for the purposes of Article 9(1). It is submitted that it probably does for the following reason. In the case of *X v Federal Republic of Germany* there were a number of options available to the applicant to manifest his religion within the existing legal framework. However, as seen from paragraph 3 above, the culture and religious beliefs of many indigenous peoples emphasise the close connection between deceased persons and the land of their origin. Where the repatriation of human remains is a fundamental tenet of the religious beliefs of such peoples the case goes beyond the exercise of a choice motivated by religious belief. It is of a similar nature to that of *Re Crawley Road Cemetery*, where it was fundamental to the applicant's religious belief that her deceased husband should not be interred in consecrated ground, or the case of *X v UK*,³⁵ where the Commission accepted that the manifestation of religion included the right of a high-caste Sikh not to undertake menial duties.

Reconciling the competing interests of indigenous peoples and those of museums

37. The rights guaranteed by Articles 8 and 9 are not absolute. In the case of Article 8 the rights can be derogated from where such derogation is: (a) 'in accordance with law'; (b) pursues a legitimate aim (e.g. protection of health and public safety, protection of the rights of others); and (c) is necessary and proportionate. In the case of Article 9 the right is subject to 'such limitations as are prescribed by law in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'. Although the wording of Article 8(2) and Article 9(2) differs, the grounds for derogating from the rights guaranteed by these Articles are similar. The measures must be lawful; they must pursue a legitimate aim, such as the rights and freedoms of others; and be necessary and proportionate (or necessary in a democratic society).

³⁵ See above, note 29.

38. Assuming that it could be established that a refusal to repatriate human remains would prima facie breach Articles 8 or 9, the question arises whether such refusal could be justified on one or more of the grounds set out in Article 8(2) or Article 9(2). The burden of justifying such refusal would rest on the museum concerned. It has not been suggested that, apart from any possible claim under the HRA, the retention of human remains by museums is unlawful. Accordingly, the lawfulness criterion in Articles 8(2) and 9(2) would be satisfied. However, the museum would have to show that the retention of the remains pursued a legitimate aim and that such retention was necessary and proportionate. The protection of the rights and freedoms of others, which is referred to in both Article 8(2) and Article 9(2), would be justifiable grounds for derogation. In the case of a museum it could be argued that this would include the right of the museum to retain human remains forming part of its collection for the purpose of educating the public by exhibiting artefacts of historical or archaeological interest, or for the purpose of preserving them for future generations on the basis that they form part of the 'cultural heritage of mankind', or for the purpose of retaining them for scientific or medical research. In order to satisfy the proportionality test, the public benefit of the museum retaining the remains would have to be balanced against the interests of the indigenous people in securing their repatriation. Where the balance might lie would need to be judged on a case-by-case basis. For example, where it can be shown that retention of human remains of a particular indigenous people is of vital importance for ongoing research into human disease then it could be argued that the balance of interest should lie in favour of retention of the human remains, at least until such time as they are no longer required for research purposes. On the other hand, if the remains are held because at some time in the future they might be of use in medical or scientific research, or because they provide a historical record of past research, then arguably this is unlikely to be a sufficiently weighty consideration to justify their retention. However, the European Court has emphasised on a number of occasions that

States have a margin of appreciation³⁶ as to the weight that should be placed on the conflicting interests and the means by which such conflicts should be resolved. The role of the Court is essentially a subsidiary one – to ensure that whatever solution may be adopted strikes a fair balance between the conflicting interests.³⁷

The prohibition on discrimination

39. Article 14 provides that the rights and freedoms set forth in the Convention are to be secured without discrimination on any ground such as ‘sex, race colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. The list of the prohibited grounds of discrimination is illustrative, not exhaustive. However, there can be little doubt that discrimination on grounds of membership of an indigenous people would be included within the scope of this article.
40. Discrimination under the Convention requires like to be compared with like, i.e. it depends upon individuals who are in similar situations being treated differently. Furthermore, there will only be discrimination if there is no objective or reasonable justification for the distinction.
41. Article 14 is not free-standing. It does not provide a general right to freedom from discrimination. It can only be invoked in relation to one of the other Convention rights set out in Articles 2 to 12 and the First Protocol. However, it is not necessary for a breach of another Convention right to be established before Article 14 can be invoked. Such an interpretation, as the Court accepted

³⁶ The ‘margin of appreciation’ is the discretion that the Convention leaves to States Parties when considering whether interference with a right protected by the Convention can be justified, e.g. whether a restriction is ‘necessary in a democratic society’.

³⁷ In the *Hatton* case referred to in note 12 the Grand Chamber stated: ‘Whilst the State is required to give due consideration to the particular interests the respect for which it is obliged to secure by virtue of Article 8, it must in principle be left a choice between different ways and means of meeting this obligation. The Court’s supervisory function being of a subsidiary nature, it is limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance’ (para 123 of judgment).

in the Belgian Linguistic case³⁸ would have deprived Article 14 of its effectiveness. All that is necessary is that the facts of the case ‘fall within the ambit’ of one or more Convention provisions.³⁹ In other words, action that falls short of the standard required to constitute a violation of a Convention right would breach Article 14 if such action were to be applied in a discriminatory manner. Similarly, where action potentially violating a Convention provision could be justified on the basis of proportionality, there would be a breach of Article 14 if such action were nevertheless discriminatory. A further example is the case where a State sets up a system of appeal courts. Article 6 of the Convention does not require a State to do this; but if the State then restricts access to its appeal courts in a discriminatory manner there would be a breach of Article 14.

42. Assume, for the sake of argument, that a refusal to repatriate human remains would fall within the ambit of Article 3 (inhuman and degrading treatment) or Article 9 (freedom to manifest one’s religion). However, the threshold for violation had not been reached, for example because the degree of humiliation or debasement could not be regarded as gross, or because the request for the repatriation of the remains, while motivated for reasons of religious belief, was not itself a manifestation of religion. Where the museum had adopted a policy (or statutory restriction) that no human remains were to be repatriated, it would be arguable that no discrimination had taken place. On the other hand, if the museum were to adopt a selective policy of returning the remains of some indigenous peoples but retaining the remains of others, then arguably discrimination against the group whose remains were retained would have occurred. Whether such discrimination could be regarded as proportionate and pursuing a legitimate aim would depend on the circumstances, and in particular on where the balance should be struck between the competing interests of the indigenous people and that of the museum in retaining the remains.

³⁸ Judgment of 23 July 1968, Series A, No 6 (1979-80) 1 EHHR 252, Section 1B, para 9 of the judgment.

³⁹ *Rasmussen v Denmark* (1985) 7 EHHR 471.

43. However, comparing like with like is not confined to comparing *identical* situations; it also extends to comparing *similar* or *analogous* situations.⁴⁰ It could be argued that a similar or analogous situation might be the case of the different treatment accorded to human remains in the custody of a hospital, medical school or laboratory and human remains in the custody of a museum. The Alder Hey Inquiry set out in graphic detail the distress and outrage of parents at the discovery that organs and tissue of their dead children had been removed and retained by the hospital without their consent⁴¹ It is clear from the information received from representatives of indigenous peoples referred to in paragraph 3 above that the distress and outrage of indigenous peoples at the retention by museums of remains of their ancestors is no less. Following the Alder Hey Inquiry and the establishment of the Retained Organs Commission, procedures are in place to enable organs and human tissue to be returned to relatives to be disposed of according to their wishes.⁴² Under these procedures the relatives of those who die in hospital are treated sympathetically and the wishes of the relatives regarding the disposal of remains are to be regarded as paramount. Where a post-mortem examination is necessary, relatives are asked to give their informed consent to the examination and to the retention of organs and human tissue. The issue of consent is therefore of paramount importance. Failure by a museum to give similar consideration to human remains in its custody, particularly in relation to the paramount importance of consent, could be argued to amount to discrimination, unless it could be shown that such discrimination pursued a legitimate aim and was proportionate.

40 See *Lithgow and others v UK*, judgment of 8 July 1986, Series A, No 102 (1986) 8 EHHR 329, para 177 of judgment, and *Fredin v Sweden*, judgment of 18 February 1991, Series A, No 192 (1991) 13 EHHR 784.

41 *Royal Liverpool Children's Hospital Inquiry Report* (2001), Chapter 2, paras 1.4 to 1.14 and Chapter 14.

42 See the Retained Organs Commission's leaflet, *Return of Organs and Tissue Direct to Families – An Information Leaflet for Parents and Relatives* (2002).

The right to property

44. Article 1 of the First Protocol provides for every natural or legal person to have the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The term 'possessions' in this Article has been interpreted broadly. It includes all property and chattels but also acquired rights with economic interests such as shares, patents, fishing rights, alcohol licences, planning consents, goodwill, pensions and welfare benefits. In *Pressos Compania Naviera v Belgium*⁴³ the term was held by the Court to include a claim for negligence, which had been removed by retrospective legislation.
45. The relevance of Article 1 of the First Protocol needs to be considered from two angles: (a) would this provision provide any remedy to the relatives of the deceased or representatives of an indigenous people seeking the return of human remains; and (b) would the provision assist a museum that was forced by legislation or otherwise to repatriate human remains? The first issue that needs to be decided is what is the 'possession'. In view of the generally accepted view in English law that (subject to exceptions) no one can have legal title to human remains, it would appear that human remains are not possessions in the strict sense of the term. But as seen the European Court has interpreted 'possession' widely to include intangible matters such as a legal right to something. Applying this test it could be argued that a legal right of the next of kin to be appointed the administrators of the estate of a deceased person would be a possession for the purposes of Article 1. The same would apply to the right of the next of kin of a deceased person to secure the handing over of a body for the purposes of burial. In the case of human remains in museums, a court might be persuaded to look beyond the confines of English law and look at the customary law and practice of an indigenous people in determining whether their interest in the remains would constitute a 'possession'.

43 (1996) 8 EHRR 301.

46. This paper does not attempt to go into the question whether the relatives of the deceased, or representatives of an indigenous people, where human remains are in the custody of a museum would have any legal rights in respect of those remains. However, if such a right exists then it is submitted that it could constitute a possession for the purposes of Article 1. The question would then arise whether the continuing retention of those remains was justified *inter alia* in the public interest. Again the public interest would appear to be the right of a museum to retain the remains in its collection because of their cultural importance or their value for medical or scientific research. This would involve consideration of those issues of proportionality discussed earlier in this paper.
47. The converse question now needs to be considered. Would Article 1 of the First Protocol provide a basis for a museum to challenge legislation, or other coercive measures, requiring the museum to return human remains in its custody? Leaving aside the question whether a museum can have legal ownership of the human remains, the museum undoubtedly has a right to the *custody* of the remains in question (whether under common law or under the terms of the statute governing the museum), as well as a legitimate expectation that it can continue to remain in custody of them. Applying the broad definition of ‘possession’ mentioned above, it would seem that its right to retain custody could constitute a ‘possession’.
48. There is however a major difficulty in a museum bringing proceedings alleging violation of its human rights. Under s.7 of the HRA a museum could only bring proceedings claiming a violation of its human rights if it were a victim of an unlawful act by a public authority (in this case HM Government). A person is a victim only if he would be a victim for the purposes of Article 34 of the Convention (s.7(7) HRA). Article 34 states that the Court can receive applications from ‘any person, non-governmental organisation or group of individuals’. Thus a public authority is not entitled to bring proceedings under the Convention.⁴⁴ It is not clear whether a hybrid body that performs a mixture of public and private functions would qualify as a victim. Lord Nicholls in the case of *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank and another* stated that a hybrid body would not be absolutely debarred from having

Convention rights at least in respect of acts of a private nature.⁴⁵ But the corollary of this must be that a museum would be regarded as a public authority in respect of acts of a public nature. As discussed earlier in this paper most museums would fall to be regarded as public authorities. Such museums would therefore have some difficulty bringing an action under the HRA in respect of their public functions (which for these purposes must include the custody or disposal of human remains within their collections) on the grounds that they would qualify as victims.

49. The same would not apply to those museums that would not fall to be regarded as public authorities. Such a museum would qualify as a victim and could allege infringement of its Convention rights. The question then arises whether a requirement to give up human remains within its collection could be justified in the public interest. Here it would be necessary for a balance to be struck between the public interest of the museum in retaining the human remains (e.g. because of their exceptional cultural, medical or scientific interest) and the public interest in upholding the human rights of the indigenous people concerned and/or redressing past injustices.
50. In this connection the issue of compensation needs to be considered. In the *Holy Monasteries* case the Court restated the position as follows:

Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a

44 *Ayuntamiento de M v Spain* (1991) 68 DR 209. 45 [2003] 3 WLR at 288.

45 [2003] 3 WLR at 288.

total lack of compensation can be considered justifiable under Article 1 only in exceptional circumstances.

Article 1 does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of ‘public interest’ may call for less than reimbursement of the full market value.⁴⁶

The problem in considering the question of compensation in relation to the repatriation of human remains is that the remains are unlikely to have any intrinsic value and no monetary payment could place the museum in the position it was before repatriation took place. On the other hand it is clear from the *Holy Monasteries* case that *some* compensation would need to be considered to avoid the measure being considered disproportionate. However, the reimbursement need not be the full market value (whatever that may be) and it may be that no more than a token payment based on the intrinsic value of the remains would suffice.

Return of cultural and religious artefacts

51. Although this paper is primarily concerned with the repatriation of human remains, mention should perhaps be made of the related problem of the return of religious and cultural artefacts. Examples of such artefacts would be: the Ghost Dance shirt returned from Glasgow Museums, an item laden with spiritual power and historical meaning; the Sacred Pole of the Omaha Nation returned from the Peabody Museum, Harvard – the central and most powerful figure in Omaha religion; the Kwakiutl dance masks and regalia, confiscated in 1921 by the Royal Canadian Mounted Police in the case of prosecuting native people following their own religious practices, and which were returned to a tribal museum; or the Stone of Destiny, removed from Holyrood Palace to Westminster Abbey and returned to Scotland at the opening of its national Parliament. Arguments for the return of all of these items focused on their importance to the identity and well-being of people today, of their role in transmitting traditional knowledge and values, and of

⁴⁶ *Holy Monasteries v Greece* (1995) 20 EHHR para 71 of the judgment.

the negative effects that continued separation from such artefacts would bring. In commenting on the meaning of sacred artefacts in museum collections to his people, Blackfoot historian George Kipp has stated: ‘Those items were the prime backbone for us to assure ourselves that we would be Blackfeet in the future. We need them back.’⁴⁷

52. Where an artefact is of significant importance to the culture or the religious beliefs of an indigenous people then arguably the continued retention of such an artefact by a museum could amount to a denial of such a people’s right to maintain their culture or to manifest their religion, thus engaging Articles 8 and 9 of the Convention. Were a museum to adopt a discriminatory policy and return some artefacts and not others then a breach of Article 14 might also arise. Where it is claimed that the retention of an artefact would breach a Convention right, it would be for the museum to justify the retention of such an artefact using the arguments of public interest, proportionality etc. discussed earlier in this paper. A further significant factor is that, unlike the case of human remains, in most cases the museum would be the legal owner of the artefact. This factor would be an important, if not determining, factor when deciding where the balance of interest lay between the competing interests of an indigenous people and those of the museum. Each case would have to be judged on its merits but there would have to be very compelling reasons for the return of the artefact to prevail over the museum’s proprietary rights.⁴⁸

Indigenous peoples and human rights in international law

53. The question of the repatriation of human remains also needs to be considered in the context of the development of international law as it relates to indigenous peoples and human rights. The European Court increasingly has

⁴⁷ Gulliford 2000:56.

⁴⁸ The question of payment of compensation would also be relevant in the event that the museum were not a ‘public authority’ and could bring proceedings as a ‘victim’ for infringement of its Article 1 Protocol 1 rights.

recourse to other human rights and other instruments to assist it in the proper interpretation of the Convention, to define the scope of the margin of appreciation, and as evidence of present-day standards when considering how to interpret the Convention as a 'living instrument'. In addition to referring to other Council of Europe instruments, such as the European Convention on Extradition, the Court frequently has recourse to UN instruments such as the International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment, and the Convention on the Rights of the Child. If faced with a human rights issue involving an indigenous people the European Court would be likely to take into account relevant international instruments and state practice in determining how the Convention should be interpreted. If a UK court were to be faced with a similar issue the court could be invited to be guided by relevant international instruments and state practice in determining the proper interpretation of Convention rights.

54. It is beyond the scope of this paper to embark upon a detailed examination of the question as to the extent to which international law protects the rights and interests of indigenous peoples.⁴⁹ However, mention should be made of a number of international legal instruments that are relevant to the rights of national minorities and indigenous peoples. The International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights in their common Article 1 recognise the right of 'all peoples' to self-determination, and that by virtue of that right may have the right freely to determine their political status and freely to pursue their economic, social and cultural development. Article 27 of the International Covenant on Civil and Political Rights obliges States in which ethnic, religious or linguistic minorities exist not to deny their right, in community with other members of their group, to

⁴⁹ For a more detailed examination of this question the reader is referred to Patrick Thornberry, *Indigenous Peoples and Human Rights*, Melland Schill Studies in International Law Manchester University Press.

enjoy their own culture, to profess and practise their own religion, and to use their own language. The International Labour Organisation (ILO) Convention 169 of 1989 revised an earlier ILO Convention and obliges States to take action to protect the rights of indigenous and tribal peoples and to guarantee respect for their integrity. Article 5 of the Convention states that the ‘social, cultural, religious and spiritual values and practices of these peoples shall be protected and recognised’. Article 8 upholds the customs of indigenous peoples provided they are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. On a regional basis, the African Charter on Human and Peoples’ Rights places emphasis not just on individual human rights but on peoples’ rights – a term intended by the drafters to include ethnic groups within states. The Council of Europe Framework Convention for the Protection of National Minorities is another legal instrument intended to confer rights, not solely on individuals but also on ‘national minorities’. In Article 5.1 the Parties undertake to promote the conditions necessary for persons belonging to minorities ‘to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage’.

55. The draft UN Declaration on the Rights of Indigenous Peoples has been under negotiation in the UN for a number of years. Although the Declaration will not be legally binding, it will, once adopted, contribute to the progressive development of international law as it affects indigenous peoples. In the current context Article 13 is relevant. It provides that:

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; *and the right to the repatriation of human remains.* (emphasis added)

Under the auspices of the OAS a draft American Declaration on the Rights of Indigenous Peoples is also being negotiated. In the area of religious freedom Article X envisages positive state action to protect indigenous sacred sites and

return graves and sacred relics appropriated by state authorities.

56. State practice can also contribute to the development of international law in this area. Cases where States have legislated on the repatriation of human remains or concluded bilateral agreements with other States form useful precedents for the development of standards at the international level.

57. It is evident from the foregoing that States are already obliged under international law to protect the cultural and religious traditions of indigenous peoples. Arguably this includes their cultural and religious traditions in the manner of disposal of the remains of their dead. The Draft UN Declaration on the Rights of Indigenous Peoples, once adopted, will further contribute to the development of international law in the area of protection of the rights of indigenous peoples. Assuming Article 13 survives in its present form, the right to repatriation of human remains will be specifically included among the right to protection of the cultural and religious traditions of indigenous peoples.

Conclusion

58. This paper does not attempt to lay down definitively whether or not a refusal to repatriate human remains would constitute a violation of one or more Convention rights and thus lead to a successful challenge under the HRA. It seeks to identify a number of preliminary issues that a court would be obliged to consider in the event of a challenge under the HRA against a refusal to repatriate human remains (or for that matter in the event that a museum was forced to repatriate such remains). Assuming a court would have jurisdiction to entertain such a challenge, the paper identifies a number of provisions of the Convention that could be engaged. One difficulty when considering this matter is the lack of directly relevant case law. Whether a challenge would be successful would depend on the circumstances of the case at the time. Admittedly some of the arguments presented in this paper may be stronger than others; and the Courts so far have tended to take a fairly restrained view when it comes to human rights challenges. On the other hand, it is the case that repatriation of human remains is capable of arousing strong feelings on the part of indigenous peoples and others and the climate of international opinion on this question is undoubtedly changing. Since the Convention is a 'living instrument' there is no guarantee that arguments that might seem overambitious or of little real substance today would not have greater weight in the future.

Kevin Chamberlain

October 2003

Appendix 4: Case summaries relating to human remains

Cases

United Kingdom

R v Kelly and another¹

An artist, Kelly, persuaded a technician at the Royal College of Surgeons to remove a number of preserved body parts from the College. Kelly used the body parts to make casts, some of which were subsequently displayed in an art gallery.

The Court of Appeal concluded that, despite its 'questionable' historical origins, there had existed for over 150 years an English common-law rule that there is no property in a body or parts thereof. Body parts were, however, held to be exceptionally capable of being property for the purposes of the Theft Act 1968, section 4, where 'they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes'.²

In the Court's view, that stage had been reached in the present case, where all the relevant specimens had been fixed or preserved by College staff or other medical agencies, and were subject to regular inspection, preservation and maintenance, while most had also been the subject of further work by prosecution. The Court further held that the fact that the Royal College of Surgeons was factually in possession and control of the body parts was sufficient for the purposes of the Theft Act 1968, section 5(1).

¹ [1998] 3 All ER 741.

² Per Rose L.J, *ibid.* at pp749-750.

Dobson and another v North Tyneside Health Authority and another³

An autopsy had been performed on a deceased woman at the request of the coroner and her brain had been removed and preserved in paraffin. The intention of the doctor in question had been to perform histology tests on the brain, but in the event he did not do so. The brain was sent to a hospital for storage.

The claimants, who were relatives of the dead woman, were contemplating litigation and needed histology tests for evidential purposes. It materialised that the brain had eventually been disposed of. The claimants brought an action against the defendants in relation to their entitlement to the brain. The defendants successfully sought to strike out the application on the basis that there is no property in the body. The Court of Appeal accepted the proposition that there is no property in a corpse, but that the principle is subject to the qualification that relatives are entitled to possession of a corpse for the purpose of burial and that the process or application of human skill can render a corpse the subject of property.

The claim in conversion failed because the next of kin could not show that they had actual possession or an immediate right to possession at the time the brain was disposed of. The claimants were not bailees of the brain and the only bailment that had occurred was between the doctor and the health authority with whom he deposited the brain for storage purposes. The claim under wrongful interference was unsuccessful given the lack of the claimants' right to immediate possession or ownership and the absence of any wrongdoing on the part of the defendant. The claimants had no action available to them in negligence, given that there was no duty of care owed to them by the defendants. The Court was not persuaded to impose a duty on hospitals to retain tissue which had been removed during a post-mortem against the possibility that it might be needed as evidence in later litigation.

³ [1996] 4 All ER 474.

In re St Mary the Virgin, Hurley⁴

In 2000, an application was made on behalf of a charitable foundation for the exhumation of the remains of a Brazilian national hero who had been buried in an English church in 1823. At the time of his death, transport of the body to Brazil would have been impractical because the journey would have taken three to four months.

The Consistory Court held that, when considering whether there was 'a good and proper reason' to grant a faculty in accordance with the test set out in *Re Christ Church, Alsager* [1999] 1 All ER 117, the principle of comity of nations was a persuasive factor. Furthermore, it was relevant that there was no opposition to the proposals, that the Parochial Church Council gave its unanimous support and that the man's surviving relatives did not oppose the proposal. The fact that the remains would be reburied in a consecrated mausoleum also contributed to the granting of the faculty.

In the Estate of Dayne Kristian Childs, Buchanan v Milton⁵

The deceased died intestate and his daughter was the only person entitled to succeed his estate. As she was a minor, her mother (who was not married to the deceased) and the deceased's adoptive mother applied to be co-administrators of the estate.

The applicant was the deceased's birth mother who was of Australian Aboriginal origin. The deceased had been adopted and brought to England where he had lived with his adoptive family. The deceased had had some contact with his birth mother in the later part of his life. The applicant wanted the deceased to be buried in Queensland, where he had been born. However, the deceased's adoptive mother and the mother of the deceased's daughter had already made arrangements for his burial in England.

⁴ [2001] 1 WLR 831 and *The Times*, 26 January 2001.

⁵ 27 May 1999; (2000) 53 BMLR 176.

An application was made by the deceased's mother under the Supreme Court Act 1981, s 116, which is used when a party seeks to displace the person who normally has a duty or the right to dispose of a body. The court's power is dependent on there being 'special circumstances' and the fact that it appears to be 'necessary or expedient' to appoint an alternative administrator. Hale J decided that the unusual set of circumstances of the case could be capable of amounting to 'special circumstances'. She decided nonetheless that in the circumstances it was not necessary to grant the application, because arrangements for a burial had already been made in the United Kingdom. In deciding whether it was expedient to displace the normal course of events, the judge balanced the competing interests of:

- the views of the birth family;
- the views of the adoptive family;
- the interests of the deceased's daughter; and
- the views of the deceased.

Having balanced these factors, even having given no greater weight to one than the other, Hale J held that there were no special circumstances making it necessary or expedient to displace the person normally entitled to be granted the letters of administration of the estate.

Yagan's head⁶

Yagan was a young Aboriginal man who had been killed by white settlers in 1833. Following his death his head was severed and preserved by means of a smoking process. In 1835, his head was presented to the Liverpool Royal Institution and when, in 1894, its collections were dispersed it was lent to the Liverpool City Museum. Yagan's head was displayed in the museum, but was later put in storage and not exhibited. In 1964, a decision was made to dispose of

⁶ Discussed in C. Fforde, J. Hubert and P. Turnbull, *The Dead and their Possessions* (2002) London: Routledge.

the head because it had already started to decompose. That year, the head was buried in a cemetery. Four years later, the bodies of 20 stillborn children and two children who had lived for under 24 hours were buried in the same plot, above the box containing Yagan's head.

In 1994 Ken Colbung, who identified himself as a descendant of Yagan, discovered the whereabouts of his ancestor's head and made an application for its exhumation. The permission of the parents of the bodies of the children buried above the head was sought; obtaining unconditional consent from all of the parents was not possible. Instead, a decision was made to exhume the head of Yagan by gaining access to the grave from an adjacent plot.

On 31 August 1997, a delegation of Aboriginal people were presented with the disinterred head of Yagan at ceremony held at Liverpool Town Hall. Yagan's head is kept in a secure place in Australia, and hitherto unsuccessful attempts have been made to locate the burial place of the rest of Yagan's body.

New Zealand

Maori head claim⁷

In 1988, the London auctioneers Bonham's advertised the sale of a *mokomokai* (Maori tattooed head). The identity of the head was unknown, but was characteristically Maori. An application was made to the High Court of New Zealand by the President of the New Zealand Maori Council for the letters of administration of the estate of the deceased. Grieg J stated that: 'there can be little, if any, dissent from the proposition that the sale and purchase of human remains for gain and for the purpose of curiosity is abhorrent to New Zealanders and, I hope, to any civilised person.'

⁷ Noted by Professor Patrick O'Keefe, (1992) 2 International Journal of Cultural Property 393.

There was no suggestion by the judge that remains could not be kept for study and consideration for archaeological and scientific purposes. Letters of administration were granted so that a personal representative could arrange for the proper burial of the head ‘according to Maori law and custom and to prevent further indignity being visited upon him’. Following this judgment, an injunction was sought in the High Court in London to prevent the sale of the head at auction. The head was subsequently buried at Whatuwahiwi on the Karikari peninsula.

Australia

Doodeward v Spence⁸

For a number of years, the claimant had been in possession of the preserved body of a stillborn two-headed child. An Inspector of Police confiscated it when the claimant was prosecuted for exhibiting the body in public. The claimant brought an action in detinue against the Inspector.

The High Court of Australia held by a majority of two to one that in certain circumstances a corpse may be treated as property:

When a person who has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.⁹

8 (1908) 6 CLR 406. And see *Smith v Tamworth City Council* (1997) 41 NWSLR 680 especially at 690 per Young J, obiter.

9 Per Griffith CJ, *ibid.* at 414.

The view of Barton J was that the corpse had never existed independently of the mother and so was not really a body or corpse in the ordinary sense of the word, or in the sense of a corpse awaiting burial.¹⁰

Higgins J, who dissented, was of the opinion that there were no authorities where it was found that there was property in a corpse, other than for the purposes of burial.

Re the Death of Unchango (Jnr); ex p Unchango (Snr)¹¹

The relatives of an Aboriginal infant who had died suddenly sought an order under the Coroners Act 1996, s 37(4), which gives the court a discretion to order that no post-mortem examination may be performed on a body.¹² There was clear evidence in the case that, according to Aboriginal belief, a body should remain intact, and, were a body to be cut, the spirit could not enter Dreamtime, and would not therefore be able to rest in peace. There was no doubt on the evidence that the infant had died from natural causes; the only uncertainty was whether the cause had been Sudden Infant Death Syndrome or some other infection. Walsh J decided that determining either of these two causes would do little to advance the matter. He took account of the strong cultural beliefs of the family and the community as well as the likely effect on their emotional well-being. The judge emphasised the unusual circumstances of the case and made it clear that this decision should not be taken as a general precedent for future cases involving people holding similar beliefs.

Wuridjal v the Northern Territory Coroner¹³

The body of a young Aboriginal girl was found in circumstances suggesting suicide by hanging. The coroner decided that a post-mortem examination should

¹⁰ He even went as far as to call the body in question 'a dead-born foetal monster' and 'an aberration of nature': (1908) 6 CLR 406 at 416.

¹¹ Supreme Court of Western Australia in Chambers, 19 August 1997. Cf *Smith v Tamworth City Council* (1997) 41 NWSLR 680.

¹² Supreme Court of Western Australia in Chambers, 19 August 1997. Cf *Smith v Tamworth City Council* (1997) 41 NWSLR 680.

¹³ [2001] NTSC 99.

be performed on her body. The girl's family and senior next-of-kin were informed of this decision. Her senior next-of-kin made an application to the Supreme Court under the Coroners Act, s 23(3), for the Court to use its discretion and make an order that the post-mortem not be performed.

Riley J indicated that a decision whether to make an order under this provision of the Act required him to weigh up the competing interests of the views of the Aboriginal family and the concern of the coroner about the exact cause of the girl's death. While not casting any doubts on the genuineness of the Aboriginal family's views, he found that, in the circumstances, a postmortem was the appropriate course to take. There was a need to determine whether the marks on the girl's neck were caused by hanging or ligature strangulation and there were suspicious surroundings to the case. He held that, owing to the level of suspicion in the case, the interests of the community in ascertaining the cause of death outweighed the interests of the family and senior next-of-kin in preserving the deceased's body unaffected by a post-mortem.

Roche v Douglas as administrator of the estate of Edward John Hamilton Rowan (deceased)¹⁴

The claimant believed that the deceased was her father. She sought an order to have tests performed on tissue, which had been taken from the deceased during surgery prior to his death, in order to determine whether he was in fact her father. Master Sanderson, sitting in the Supreme Court of Western Australia in Chambers, held that human tissue could be classified as property. He considered that it defied reason not to regard tissue samples as property given that they had a physical presence which continued to exist until destruction.¹⁵ In his view, if one were to treat as property the paraffin in which tissue samples were kept and yet not treat the samples in the same way, this would create a legal fiction.¹⁶ Accordingly, he made an order allowing the performance of the tests sought by the claimant.

¹⁴ [2000] WASC 146.

¹⁵ Ibid. at para 24.

¹⁶ Ibid. at para 24.

In the Matter of Warren Andrew Gray¹⁷

The applicant wanted to become pregnant by artificial insemination of semen taken from her dead husband. The process would have involved the removal of a section of his testicle. An application was made to the Supreme Court of Queensland for an order so that the procedure might be carried out.

The deceased died intestate and the applicant was likely to have been granted letters of administration. The deceased's father (his next-of-kin) gave consent to the procedure. The deceased was an organ donor, although he had not discussed with his wife the subject of insemination of his wife after his death.

Chesterman J was of the opinion that the court did not have the power to make the order sought by the applicant, nor did he think it should be exercised in her favour. He saw it as a clearly established principle that the deceased's personal representative, or where there is none, his spouse or parents, have the right to possession of the body for the purposes of its proper disposal. However, this right of possession did not include the right to remove parts of the body.¹⁸

Even though the judge was of the opinion that there was no power of the court to make such an application in this case, he considered that, had the power existed, he would not have used it in the instant case for the following reasons:

- There did not appear to be consent on the part of the deceased.
- The judge had no confidence that the applicant's decision had been carefully and rationally deliberated given her grief and shock at the death of her husband (the procedure had to be performed within 24 hours of his death).

17 [2000] QSC 390.

18 See *ibid.*, paras 20 and 21 of the judgment.

- The judge was concerned about the interests of any child born as a result of this procedure and the possible emotional problems which he might encounter in the future as a result of his conception.¹⁹

Jones v Dodd and another²⁰

A dispute arose between the father and the widow of a deceased man, as to his burial-place. The father wished his son to be buried in 'the family row' whereas the widow wanted his body to be buried near to the place where she and the couple's children lived. The deceased and his wife had not been de facto husband and wife for ten years before his death.²¹

Millhouse J confirmed that there is no property in a dead body, in the sense that it is incapable of being owned by someone. He gave *Williams v Williams*²² and *R v Sharpe*²³ as authorities for this proposition.

In this case, the judge considered that it was unlikely that there would be an application for administration of his estate (the deceased man had died intestate), given that there was little or no estate on this occasion. Millhouse J felt that in a case such as this, the proper approach was to have regard to the practical circumstances, and the need for sensitivity towards the various relatives of the deceased as well as to religious, cultural and spiritual matters.²⁴ The judgment of the court pointed to the fact that proper respect and decency compel the courts to have regard to relevant 'spiritual or cultural values', even where evidence as to the relevance of such considerations is conflicting.²⁵ Such an approach was thought to be in accordance with the spirit of various international instruments. The application of these principles to the facts of this case meant that cultural,

¹⁹ See *ibid.*, para 23 of the judgment.

²⁰ [1999] SASC 125.

²¹ Since the end of their relationship, the deceased visited his children at Port Augusta at least three or four times a year.

²² (1882) 20 Ch D 659.

²³ (1856-1857) Dears & Bell 160; 169 ER 959.

²⁴ [1999] SASC 125, para 51 of the judgment.

²⁵ *Ibid.*, para 53 of the judgment.

spiritual and religious factors should be given appropriate weight because they were emphasised by the father of the deceased. The evidence demonstrated that the views of the head of the family should prevail.²⁶ Accordingly, the deceased's father had the right to bury his son.

In later proceedings between the father of the deceased man and the de facto wife with whom the deceased man had lived at Port Augusta for some nine years before his death (and by whom he had two children) Doyle CJ held that it was the de facto wife who was entitled to have the body delivered to her for the purpose of making arrangements for burial.²⁷ In so holding, Doyle CJ held that the persuasive force deriving from the de facto wife's claim to be granted administration of the estate, and from the attitudes of modern society towards a partner's wish to bury her deceased de facto husband, prevailed over the force of the paternal relationship and the fact that the father had testified that his wish to bury the deceased at Oodnadatta (where his natural family lived) was in accordance with an organised system of beliefs and cultural practices 'and possibly also of Aboriginal law'. The judge acknowledged that he made this determination with understanding and respect for the wishes of both parties and on the understanding that the de facto wife would allow the parental family to attend the funeral.²⁸

26 *Ibid.*, para 69 of the judgment.

27 *Dodd v Jones* [1999] SASC 458.

28 *Ibid.*, para 41.

Summaries of recent articles which are relevant to the issue of human remains

Articles

Sir Anthony Mason – ‘Ethical dilemmas for charities: Museums and the conscionable disposal of art’¹

The author observes that the law relating to the ownership of human remains is not wholly clear. He discusses the argument that a provision in the governing statutes of museums that prohibits the disposal of items from collections may not apply to human remains which are not owned by the relevant museums because they cannot constitute property.

In relation to general repatriation requests where a moral claim is made, the author accentuates three questions:

- whether the moral claim is so strong that effect should be given to it;
- whether the trustees or those controlling the institution have power to give effect to the claim and would be justified in exercising that power (this question will depend upon the provisions of the institution’s governing statute, if there is one, and whether it has the legal status of a charity); and
- whether procedures are available under the existing law, the Charities Act and the Regulatory Reform Act 2001, to enable return to be made.²

The author points out that trustees can satisfy moral claims only within the framework of the law. He suggests that where charitable institutions fail to

¹ The Hon Sir Anthony Mason AC, KBE, ‘Ethical dilemmas for charities: Museums and the unconscionable disposal of art’, lecture delivered to the Institute for Philanthropy, University College London, 1 October 2002, published in (2002) VIII *Art Antiquity and Law* 1.

² Ibid. p 3, para 5.

recognise their moral obligations, this contradicts the very basis on which their existence depends and ‘would tend to undermine the goodwill which is the foundation of their public support’.³

The author suggests that other considerations are involved when dealing with the repatriation of Australian and Tasmanian Aboriginal human remains.

He opines that the arguments put forward in support of retention are ‘by no means compelling’.⁴ In situations where the prospect of scientific research is not a realistic one, the author suggests that there is no strong reason to withhold repatriation. This is particularly so in cases where remains have been removed from burial places. He points out that the critical question that remains is whether the holding institution has the power to repatriate lawfully.

Tristan Shek – ‘Can dust remain dust? English law and indigenous human remains’⁵

The author suggests that human remains belong to a special category of their own which is different from other excavated material. In this arena the law has to perform a delicate balancing act.

He charts the no-property rule in disinterred remains which exists in English law from Hayne’s case in 1614 and its somewhat ‘dubious origins’. He identifies the rationale for the rule as being:

- the principle that autonomy in humans as living beings extends to their mortal remains as recognition of the sanctity of life even after death; and
- protection from the mistreatment which might occur if a person were to have unfettered rights of property in a body.⁶

3 Reference is made to Re Snowden [1970] Ch 700 at 709.

4 Mason, op.cit. p 5, para 11.

5 T. Shek, ‘Can dust remain dust? English law and indigenous human remains’, in (2000) V *Art Antiquity and Law* 265.

6 Ibid. p 269.

The author then turns to the issue of uninterred remains where the no-property rule is not absolute.

First, he notes the existence of the limited possessory right which is granted to an executor for the purpose of burial of the body.

Secondly he turns to the so-called *Doodeward v Spence* exception.

Having considered the legal arguments that might be put forward in relation to a claim for indigenous human remains (in the context of the Maori head claim), he suggests that the strongest argument is an ethical one. The author asks the rhetorical question as to whether the law should also consider ‘the basis on which disadvantaged minorities found their objections to a proposed commercial transaction [in human remains]’.

He points out that the burial of bodies is of importance to Aboriginal beliefs and that at times there can be a clash of world-views.

In relation to the Human Rights Act 1998, he suggests that Aboriginal beliefs themselves would be protected by virtue of Article 9(1) of the ECHR. He points out that in relation to actions by museums and other such institutions, it may not be that the beliefs are being suppressed, but rather that museum officials might be ignoring or dismissing indigenous views.

He suggests that Article 9(1) alone affords little help in relation to indigenous remains, but that there is more hope in conjunction with Article 14. Where there is differential treatment of indigenous human remains (where the facts at issue fall within the ambit of Article 9(1)), then a breach of Article 14, which prohibits discrimination, is possible. It is necessary that there be no reasonable and objective justification for the difference in treatment.

The author suggests that it is not justifiable to argue that many institutions also house collections of human remains of other than indigenous origin. He states that the difference in treatment is not in relation to the collections themselves, but rather in relation to the way in which repatriation requests are dismissed.

National museums such as the British Museum and Natural History Museum would be public institutions within the meaning of the Human Rights Act 1998, although he points out that the situation in relation to other holding institutions may not be quite so clear. He also highlights the restrictions on the national museums' powers of disposal, for example under the British Museum Act 1963, s 5.

Charlotte Woodhead – ‘A debate which crosses all borders – The repatriation of human remains: More than just a legal question’⁷

In relation to the ownership of human remains, the author suggests that most human remains in museum collections have undergone some form of preservation which would bring them within the requirements of Rose LJ in *R v Kelly*.⁸

She suggests that an analogy may be drawn between the case of the Maori head claim, in which Grieg J discussed the macabre circumstances of the case where the sale was either for gain or curiosity's sake, and cases where the display of remains is solely for curiosity's sake.⁹

The author supports the view that there should be a consistent policy in relation to human remains since previous debates on the repatriation of human remains have focused on the repatriation of indigenous remains, to the exclusion of many other remains housed in museums and other such institutions.

7 C. Woodhead, 'A debate which crosses all borders – The repatriation of human remains: More than just a legal question', in (2002) VII *Art Antiquity and Law* 317.

8 [1998] 3 All ER 741 at 749, where Rose LJ stated that body parts were capable of being property within the meaning of the Theft Act 1968, s-4, if 'they have acquired different attributes by virtue of the application of skill, such as dissection or preservation techniques, for exhibition or teaching purposes'.

9 Noted by Professor Patrick O'Keefe, 'Maoris claim head', in (1992) 2 *International Journal of Cultural Property* 393.

She advocates a legal framework within which institutions can make decisions on a case-by-case basis, giving due consideration to ethical and religious considerations.

The repatriation of human remains differs from more general debates on repatriation. Repatriation of human remains is not predominantly a legal issue nor is it a political one. The primary consideration is the respectful treatment of human remains as human remains.

James Nafziger and Rebecca Dobkins – ‘The Native American Graves Protection and Repatriation Act in its first decade’¹⁰

The authors describe the Native American Graves Protection and Repatriation Act (NAGPRA) as being essentially human rights law, with one of its obvious benefits being its ‘systematic promotion of human rights, self-determination, and distributive justice on behalf of Indian tribes and Native Hawaiian organizations’.¹¹ Furthermore, the legislation has the effect of redressing historical grievances. They point out that NAGPRA brings together principles of international law, domestic law and tribal law.

The experience of the authors at the Willamette University in Oregon has shown that NAGPRA has strengthened their working relationship with tribes in the region. Consultation between such parties has actually led to the institution being able to identify objects which had previously been unidentified. The authors suggest that ‘NAGPRA has unquestionably revitalized the field of museum anthropology and archaeology, perhaps even bringing “disciplinary renewal out of national disgrace”’.¹²

10 J. Nafziger and R. Dobkins, ‘The Native American Graves Protection and Repatriation Act in its first decade, in (1999) 8 International Journal of Cultural Property 77.

11 Ibid., p 81.

12 Ibid., p 91. Reference is made here to K.S. Fine-Dare, ‘Disciplinary renewal out of national disgrace: Native American Graves Protection and Repatriation Act compliance in the academy’, in *Radical History Review* 68(1997) p 25.

The authors discuss the role of dispute resolution, two methods of which are provided for by NAGPRA: first, the Review Committee and the federal court jurisdiction. One of the most difficult issues for the NAGPRA Reviewing Committee has been deciding how to deal with those human remains which are 'culturally unidentifiable'. Certain tribes and agencies have dealt with the problem by various means: examples include repatriation to the geographical location when cultural affiliation is unknown or reburial overseen by representatives of various tribes.

At the time of writing, only five disputes had been brought to the Committee and the authors opine that this low figure may be due to the fact that the Committee lacks sanctions to support its recommendations. Although consensus has been a feature of the Committee's work, the authors are of the opinion that from the experience of the five disputes heard by the Committee, it is not very effective at facilitating dispute resolution. Instead, its role has been more of 'a forum, catalyst, and monitor of NAGPRA implementation'.¹³

With regard to the federal court jurisdiction, the authors highlight the fact that this method of dispute resolution had also not been heavily utilised. They point out that in many cases consultation and negotiation have been prevalent as methods of reaching solutions.

¹³ Nafziger and Dobkins, *op. cit.* p 96.

Appendix 5: International Agreements

Draft Declaration on the Rights of Indigenous Peoples

Commission on Human Rights: Sub-Commission on Prevention of Discrimination and Protection of Minorities Forty-fifth session

Discrimination against indigenous peoples Report of the working group on indigenous populations on its eleventh session

Chairperson: Ms Erica-Irene A Daes

ANNEX I

Draft declaration as agreed upon by the members of the working group at its eleventh session

Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the rights of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of all civilizations and cultures, which constitute a common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the rights and characteristics

of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, and social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

Acknowledging that the Charter of United Nations, the International Covenant on

Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those relating to human rights, as they apply to indigenous peoples, in consultation and cooperation with the people concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

Part I

Article 1.

Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in the human rights law.

Article 2.

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.

Article 3.

Indigenous people have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4.

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 5.

Every indigenous person has the right to belong to a nationality.

Part II**Article 6.**

No Genocide Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

Article 7.

Indigenous peoples have the collective and individual right not to be subject to ethnocide and cultural genocide, including the prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or identities;
- (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- (c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- (e) Any form of propaganda directed against them.

Article 8.

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Article 9.

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Article 10.

Indigenous peoples shall not be forced from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11.

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit indigenous individuals against their will in the armed forces and, in particular, for use against other indigenous peoples;
- (b) Recruit indigenous children into the armed forces under any circumstances;
- (c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centers for military purposes;
- (d) Force indigenous individuals to work for military purposes under any discriminatory conditions.

Part III

Article 12.

Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

Article 13.

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to use and control of ceremonial objects; and the right to repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 14.

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, especially whenever any right of indigenous peoples may be affected, to ensure this right and to ensure that they can understand and be understood in political, legal and administrative proceedings where necessary through the provision of interpretation or by other appropriate means.

Part IV

Article 15.

Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

Article 16.

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate all prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society.

Article 17.

Indigenous people have the right to establish their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity.

Article 18.

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, inter alia, employment and salary.

Part V**Article 19.**

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions.

Article 20.

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.

Article 21.

Indigenous people have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation.

Article 22.

Indigenous people have the right to special measures for immediate effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons.

Article 23.

Indigenous people have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous people have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to

administer such programmes through their own institutions.

Article 24.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care.

Part VI

Article 25.

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26.

Indigenous peoples have the right to own, develop, control and use the lands and territories, including to total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

Article 27.

Indigenous peoples have the right to the resititution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28.

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and production capacity of their lands, territories and resources, as well as to the assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measure to ensure, as needed, that programmes for monitoring, maintaining and restoring health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 29.

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Article 30.

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreements with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Part VII

Article 31.

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Article 32.

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33.

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human right standards.

Article 34.

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities.

Article 35.

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across the borders.

States shall take effective measures to ensure the exercise and implementation of this right.

Article 36.

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.

Part VIII**Article 37.**

States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 38.

Indigenous people have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration.

Article 39.

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with the States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.

Article 40.

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the

provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 41.

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration.

Part IX

Article 42.

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 43.

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 44.

Nothing in this Declaration may be construed as diminishing or extinguishing the future rights that indigenous peoples may have or acquire.

Article 45.

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.

Source: United Nations Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Populations on its Eleventh Session. Chairperson-Rapporteur: Erica-Irene A. Daes. U.N. Doc. E/CN.4/Sub.2.1993/29/ Annex I.23 August 1993.

The Vermillion Accord on Human Remains

The Vermillion Accord was adopted in 1989 at the South Dakota **WAC Inter-Congress**.

1. Respect for the mortal remains of the dead shall be accorded to all, irrespective of origin, race, religion, nationality, custom and tradition.
2. Respect for the wishes of the dead concerning disposition shall be accorded whenever possible, reasonable and lawful, when they are known or can be reasonably inferred.
3. Respect for the wishes of the local community and of relatives or guardians of the dead shall be accorded whenever possible, reasonable and lawful.
4. Respect for the scientific research value of skeletal, mummified and other human remains (including fossil hominids) shall be accorded when such value is demonstrated to exist.
5. Agreement on the disposition of fossil, skeletal, mummified and other remains shall be reached by negotiation on the basis of mutual respect for the legitimate concerns of communities for the proper disposition of their ancestors, as well as the legitimate concerns of science and education.
6. The express recognition that the concerns of various ethnic groups, as well as those of science are legitimate and to be respected, will permit acceptable agreements to be reached and honoured.

Appendix 6: Professional and Institutional Approaches to Human Remains

Museum Ethnographers Group Guidelines on Management of Human Remains

Professional Guidelines concerning the storage, display, interpretation and return of human remains in ethnographical collections in the United Kingdom.

Introduction

- 1.1 Human remains are defined as including both prehistoric and historic biological specimens as well as artefacts (i.e. items made from human remains which have been altered by deliberate intent) in ethnographic collections in British museums. MEG acknowledges that other groups of museum professionals have overlapping areas of interest in human remains as defined above.
- 1.2 Different practices have commonly been applied in the curatorship of human remains from western and non-western societies. However, not all human remains in museums are problematic.
- 1.3 A number of interested parties claim rights over human remains. These include: actual and cultural descendants, legal owners and the worldwide scientific community. Governing bodies, museum curators and others have to evaluate these potentially competing interests and acknowledge that ideas about the legal and moral aspects of holding many sorts of material are complex and may not always coincide.
- 1.4 Human remains in museum collections were often acquired under conditions of unequal relationships. Ethnic and minority peoples are now taking back control over the preservation and interpretation of their heritage. This is part of the

growing politicization and cultural recuperation which is taking place amongst indigenous peoples in various parts of the world. The claim for the return of human remains may in some circumstances be a method of political self-assertion. In order to take these issues forward, it is necessary to open dialogue between museum professionals and indigenous peoples from a position of equality.

- 1.5 Attitudes to death and human remains differ from one culture to another, and change within cultures over time. Curators need to address cases both in the light of the present day situation and in a full and deliberate consciousness of all the historical circumstances. The question of human remains in museums is a developing issue. Therefore, policies made now may need to be reviewed in the future.
- 1.6 Requests concerning the appropriate care or return of particular human remains must be resolved by individual museums on a case by case basis. This will involve the consideration of ownership, cultural significance, the scientific, educational and historical importance of the material, the cultural and religious values of the interested individuals or groups and the strength of their relationship to the remains in question.

Collection management

- 2.1 Museum collections are in the public domain and bona fide enquirers have the right of access to data on holdings.
- 2.2 However, it may be appropriate to restrict access to certain specified sacred items where unrestricted access may cause offence or distress to actual or cultural descendants. This may include the provision of separate storage facilities.
- 2.3 Governing bodies and curators should consider all the ethical and legal implications before considering the active or passive acquisition of human

remains.

Display and interpretation

- 3.1 Curators should take a proactive rather than a reactive position with regard to the display of human remains. Existing display arrangements should be evaluated to consider whether the current treatment is likely to cause offence to actual or cultural descendants.
- 3.2 The process of preparing a display is a subjective editorial activity. Curators should inform themselves of the concerns of indigenous peoples and where practicable should seek their involvement through consultation.
- 3.3 Exhibitions in museums carry authority. Curators should be aware of the likely public effects of exhibitions. They should evaluate whether an exhibition is reinforcing cultural stereotypes or broadening an understanding of a particular group of people in a way which is relevant to the present day.

Request for the return of human remains

- 4.1 All requests for the return of human remains should be accorded respect and treated sensitively.
- 4.2 It is the responsibility of the curator to assess the validity of the person or group making requests and to establish the credentials of their claim.
- 4.3 Long-term loans are considered to be an inappropriate method of responding to request for the return of human remains.
- 4.4 The rules and governance of the museum or institution will dictate the parameters for any action.

- 4.5 Legal ownership of requested items needs to be established before any transfer can be considered.
- 4.6 Before any decision is made the curator should establish and inform the governing body of the long-term fate of the items under consideration. This may include either the transfer to a museum or a local keeping place, or the return to the community for customary disposal such as cremation or burial.
- 4.7 The cost and means of return should be considered before a decision is taken.
- 4.8 In those cases where a museum is free to dispose of items the Museums Association's Code of Ethics and the Museums & Galleries Commission's *Registration Scheme for Museums and Galleries in the United Kingdom* should be followed.
- 4.9 Before any transfer takes place items should be fully documented and a copy should be transferred with them.

These guidelines were adopted at the Museum Ethnographers Group Annual General Meeting on 23 May 1991 and revised at the Annual General Meeting on 7 April 1994. They have previously been published in *MEG News*, August 1991, in the *Museum Journal* Vol. 94.7, July 1994 and in the journal of *Museum Ethnography*, No. 6, 1994. Reprinted here with the permission of the Museum Ethnographers Group.

DUCKWORTH LABORATORY POLICY ON HUMAN REMAINS HUMAN SKELETAL REMAINS Duckworth Laboratory

Over recent years, concern has been expressed by a number of groups about the keeping of collections of human skeletal material by museums and other research organisations. Such material has, and still is, used extensively by anthropologists, forensic scientists and other researchers to study the evolution of the human species, the evolution of human diversity, the nature of human morphological adaptation, the history of diseases that afflict human beings, and the changes in disease expression through time. The scientific techniques available to such studies continue to be developed and enhanced, so that it is now possible to obtain genetic information from skeletal remains, chemical isotopic signatures for interpreting past diets and geographic migration, internal morphological structures and life-history parameters. Through the studies carried out throughout the 20th century and those being carried out at the moment, an enormous body of knowledge about the biology of past populations has been accumulated. Future studies will be able to build on current knowledge, as well as break new frontiers of research as technical innovations become available.

It is the view of those responsible for the Duckworth Laboratory, therefore, that human skeletal collections have, continue to be, and will remain a major part of our national and international heritage. As such, we believe that their scope and integrity should be preserved so that they may help answer the questions posed by current and future generations of scientists.

In Cambridge, the Duckworth Collection, amounting to the partial or complete skeletal remains of approximately 18,000 individuals, is available to study by *bona fide* scientists from any part of the world. Every request for access to the collection is examined individually, including the nature of the proposed research. Most of the Duckworth Collection originates from archaeological excavations, and includes some of the best examples of palaeopathological conditions, as well as representatives of all major geographical groups of people. Because of the scientific importance of the collection and its inherent potential,

the Duckworth Laboratory does not accept requests for repatriation simply on the basis of geographical origin or cultural association. Only requests arising from next of kin for the remains of named individuals within the collection, or for the remains of individuals for whom a biological relatedness can be established, will be considered. These will be treated on case by case basis, and all effort towards a satisfactory outcome to all parties will be made. We consider the onus of demonstration of biological relatedness the responsibility of the claimant.

Dr. Marta Mirazón Lahr

January 2002.

NATURAL HISTORY MUSEUM POLICY ON HUMAN REMAINS

This document sets out the Museum's present policy position on human remains – it is the basis for operational procedures and is a platform for future policy development. It complements the more general policies of The Natural History Museum in the publication

Curatorial Policies and Collections Management Procedures 1998.

Principles and Scope

Scientific research

The Natural History Museum is committed to the scientific study of humans as part of its mission to promote the discovery and understanding of the natural world. Such scientific research may include: studying human origins and evolution; identifying patterns of variation within and between human populations in time and by geographical area; determining the impacts of diet and disease on particular populations; and exploring the nature of human interaction with the environment at different times in our past.

The collections

The Natural History Museum holds human remains in its collection as an essential reference resource, providing evidence for scientific study, and aims to maintain high collections management standards. The Museum is firmly convinced that there is continuing scientific value in this collection, and that it should continue to be the focus of active research. The scale of the collection of human remains in the Museum stands at almost 20,000 items (many of which are partial skeletons or individual bones). More than half of this number is from the British Isles, some dating back tens of thousands of years.

Access

The Natural History Museum is committed to the principle of access to its collections, science, intellectual and information resources. This applies to human remains in various ways: many visiting research scientists work directly

on the collection; the wider scientific community benefits from specialist publications; and the public are given access through popular publications, considerable media coverage, and via the Internet. The Museum is exploring the provision of new forms of access to a greater diversity of people – a policy allowing access for non-scientists is set out below, and collections databases are helping to meet a range of new demands for information.

Collaboration and partnerships

The Natural History Museum advocates the need for international collaboration and partnership in furthering its objectives, on both a practical and policy level. The Museum welcomes discussion and policy collaboration that can inform its strategic thinking – it has actively developed wide-ranging contacts on human remains policy and practice to explore the options available for current and future development.

Scope

For the purposes of this policy, the term ‘human remains’ refers to items that are less than 10,000 years old.

Policy Objective 1 – To maintain a clear policy framework for Human Remains in the Museum

1. Trustees

The authority and responsibilities of the Trustees with respect to the collections and activities of the Museum are set out in section 2 of *Curatorial Policies and Collections Management Procedures 1998*.

2. Director and Director of Science

The Director and the Director of Science are responsible for development of the Museum's collections policy, including human remains, and for overseeing policy implementation.

3. Keepers

The Keepers are responsible for implementation of policy and for the development and implementation of procedures related to collections management.

Policy Objective 2 – To maintain high standards in collections management for human remains

4. Formal acquisition, accession and registration

In fulfilling its scientific role, The Natural History Museum may continue to acquire human remains and to add them formally to the collection. The Museum will add remains to the collection when it is satisfied that it can hold the remains in a lawful manner, when provenance can be clearly established, and when the remains are of scientific value to the Museum.

In general terms, the Museum's policy position is set out in *Curatorial Policies and Collections Management Procedures 1998*:

The Natural History Museum will not acquire, by whatever means, any object unless the Museum is satisfied it can obtain title to the object in

question, and that it has not been acquired in, or exported from, its country of origin (or any intermediate country in which it may have been legally owned) in violation of that country's laws. (para. 5.3.4 *Curatorial Policies and Collections Management Procedures 1998*)

In making decisions to acquire human remains and add them to the collection, the Museum will make full consideration of all relevant issues.

5. *Temporary holdings*

Some human remains may be held in the Museum on a temporary basis for the purposes of scientific research. Remains of this sort should have an established provenance, a clear potential value for scientific research, and a clear legal basis on which they are held.

6. *Storage and security*

Human remains are held in the Museum in dedicated secure store areas. Access to these areas, to adjoining workrooms, and to the remains themselves is allowed only to authorised staff or to visitors with specific permission and under agreed supervisory arrangements.

7. *Care and conservation*

Human remains are cared for and stored in conditions intended to preserve their physical integrity. Environmental conditions are monitored (including regular recording of temperature and humidity) and pest control is conducted.

Staff and visitors are required to follow departmental handling and good practice guidelines. The guidelines are made available to those using the collection for the first time and provided in written form. Those who do not follow the guidelines are likely to be refused further access.

8. *Loans*

The loan of human remains is covered by the Museum's general policies on loans, which are set out in *Curatorial Policies and Collections Management Procedures 1998*, the relevant sections of which are as follows (numbering follows original):

5.9 *Loans policy*

5.9.1 Specimens from the collections of The Natural History Museum are available for loan for scientific study or public display, subject to certain conditions, under the terms of the British Museum Act 1963.

5.9.2 Loans of an unusual nature and any one loan comprising objects with a total value of more than £10,000 must be approved by the Board of Trustees.

(5.9.3 refers to CITES (the Convention on International Trade in Endangered Species of Wild Fauna and Flora).)

5.9.4 The Museum reserves the right to refuse to make loans at its discretion, and further loans may not be made to individuals or institutions if loans are not returned at the agreed time or if conditions have not been strictly observed.

Loans for scientific study

5.9.5 Subject to considerations of safety of specimens, the Museum will send on loan for scientific study type specimens and other material which has been the subject of publication. In addition, the Museum aims to make available other named and easily-accessible, part-sorted material for use in taxonomic studies. The collections benefit greatly from such activity. However, some limits on loans are inevitable because of the size of the demand. Other curatorial activities and the needs of the Museum's own research programmes must be balanced against requests from outside and the Museum reserves the right to refuse to lend material.

- 5.9.6 Certain international work practices and agreements make the loan conditions for some collections more stringent than above. For example, there is an international understanding that mammalian and bird type material is rarely sent out on loan but is available to visitors.
- 5.9.7 Loans are despatched only to destinations where appropriate secure transport and insurance arrangements are available.
- 5.9.8 Scientific loans are normally made to individuals working in recognised institutions and are the joint responsibility of the individual and the institution. Loans for students, artists, and some others will be made to their supervisor, who will be held responsible for the material. Loans will be made to private addresses only in exceptional circumstances.
- 5.9.9 No loans leave the Museum until an appropriate agreement has been signed by the borrowing institution and individual concerned.
- 5.9.10 The maximum initial loan period for primary type specimens (the specimens which act as the reference points for names of species, that is, holotypes, lectotypes, neotypes and syntypes) and for figured palaeontological material is 6 months. The maximum initial period for other loans is one year. Some may be extended, at appropriate intervals, to a maximum of five years upon application before the initial due date. Annual extensions beyond five years are subject to Keeper's approval. The total loan period shall not exceed 10 years unless at the end of that period the loan is inspected by an approved Museum employee at the borrower's expense.

Loans for public display

5.9.11 All proposals for the loan of specimens for public exhibition will be referred to the Director of Science. In the first instance, proposals should be addressed to the Keeper(s) of the department(s) concerned.

(5.9.12 deals with conditions for loans for public exhibition -refer to the original for details.)

9. *Deaccessioning/disposal of registered objects*

The Museum's policies on disposal are set out in detail in *Curatorial Policies and Collections Management Procedures 1998*. The British Museum Act 1963 and the Museums and Galleries Act 1992 provide the legal framework within which disposal may be considered. The British Museum Act 1963 states:

5. (1) The Trustees of the British Museum may sell, exchange, give away or otherwise dispose of any object vested in them and comprised in their collections if –
- (a) the object is a duplicate of another such object, or
 - (b) the object appears to the Trustees to have been made not earlier than the year 1850, and substantially consists of printed matter of which a copy made by photography or a process akin to photography is held by the Trustees, or
 - (c) in the opinion of the Trustees the object is unfit to be retained in the collections of the Museum and can be disposed of without detriment to the interests of students:

Provided that where an object has become vested in the Trustees by virtue of a gift or bequest the powers conferred by this subsection shall not be

exercisable as respects that object in a manner inconsistent with any condition attached to the gift or bequest.

- (2) The Trustees may destroy or otherwise dispose of any object vested in them and comprised in their collections if satisfied that it has become useless for the purposes of the Museum by reason of damage, physical deterioration, or infestation by destructive organisms.

The Museum's policy on disposal adds that '... Section 6 of the Museums and Galleries Act 1992 permits the Trustees to dispose of an object, by way of sale, gift or exchange, to the other national institutions listed in Schedule 5 to the Act ... However, there is a strong presumption against disposal of specimens, other than by transfer as gift or in exchange to another suitable institution (that is, not restricted to those listed in the 1992 Act), or by destructive investigation for research purposes' (*Curatorial Policies and Collections Management Procedures 1998* para 5.4.1).

The Museum's policy continues 'Any decision to dispose of registered objects will be taken only after due consideration. The Museum will assess all material considered for disposal in terms of its scientific, historical and cultural importance; the needs of both present and future users; and legal and ethical issues as they relate to that material' (*Curatorial Policies and Collections Management Procedures 1998* para 5.4.4).

Policy Objective 3 – To maintain a high standard of documentation on human remains

10. Documentation

The Museum aims to meet the documentation standards referred to in section 5.7.1 of *Curatorial Policies and Collections Management Procedures 1998*: 'The Museum aims to meet the requirements of *SPECTRUM: The UK Museum Documentation Standard* ... subject to the limitations imposed by the size and

use of the collections. The sheer number of specimens and volume of transactions in The Natural History Museum, coupled with the special needs of scientific research, demand a pragmatic, but carefully considered approach.’

The Museum aims to improve the quality and scope of information on human remains and to this end has an ongoing programme of development of information and documentation, including electronic databases.

11. *Archives*

Information in the Museum’s Archives is available for inspection by members of the public by arrangement with the Archivist (see contact information below).

12. *Access to information*

The Natural History Museum is committed to the principle of access to its information resources, and will respond positively to those requesting information on the human remains in the collection. The Museum will work with the enquirer to determine how their needs may be best satisfied, particularly where requests are general, or where a response may demand considerable resources. The Museum operates under UK Government guidance on access to information.

All requests for information on the collection must be made in the first instance to the Keeper of Palaeontology.

Policy Objective 4 – To enable research on human variation, human origins, bioarchaeology and related subjects

13. *Access to human remains for research*

Access to human remains in the Museum is provided for *bona fide* academic research workers.

The general terms of access for research are outlined in *Curatorial Policies and Collections Management Procedures* 1998 as follows (numbering follows the original):

- 5.8.2 Access to the research and reference collections is controlled by the Keepers and staff of each department. It is each Keeper's responsibility to set out regulations governing access. An appointment is usually necessary and initial contact should be made with the relevant Collections Manager.
- 5.8.3 Visitors who handle the collections must be properly trained in relevant aspects of their care.
- 5.8.4 Resource limitations, environmental or conservation requirements and security considerations will inevitably constrain access to the collections and the Museum reserves the right to refuse or terminate access at its discretion.
- 5.8.5 Where appropriate, visitors are requested to make provision, through their funding bodies, for Bench Fees or a Research Support Grant. A charge is mandatory if the collections are consulted for commercial purposes. Along with many other scientific institutions and universities the Museum now attempts to recover some of the substantial resource costs associated with provision of access to the collections.

Research work may be conducted only by *bona fide* academic researchers affiliated to universities, governments and associated institutions. A brief research proposal must be submitted in advance for consideration and approval by the Keeper of Palaeontology, making clear reference to all procedures and techniques to be used.

14. *Use of the collection*

Researchers are required to follow handling and good practice guidelines to which reference is made above (section 7).

15. *Sampling, analysis and casting*

Destructive and invasive sampling and analysis may be permitted for some research purposes but advance discussion and authorisation is required – detailed policies are set out in *Curatorial Policies and Collections Management Procedures 1998* as follows (numbering follows the original):

5.5 **Destructive and invasive sampling**

- 5.5.1 Destructive or invasive sampling of specimens for research purposes generally involve irreversible changes (including, sometimes, complete destruction) to the objects involved. Decisions on such matters will be taken only after due consideration. The Museum will assess material potentially involved in such research in terms of its scientific, historical and cultural importance; the needs of both present and future users; and legal and ethical issues as they relate to that material.
- 5.5.2 Decisions on use of specimens for dissection or destructive or invasive sampling will be taken in accordance with procedures set out by the Keeper of each department. Decisions will generally involve at least one member of the curatorial staff independent of the relevant research. Investigations which result in the complete destruction of an object constitute a disposal and are thus governed by the provisions of section 5.4 above.
- 5.5.3 Proposals for research involving donation of whole or part specimens or for dissection or destructive or invasive sampling of specimens should be addressed to the appropriate Collections Manager. (The specific guidelines on the use of Museum specimens in DNA-based studies are additionally given in Appendix 8.)

Applicants should provide brief details of the proposed project, its justification, method, their competence and the institution where the work is to be done.

Proposals will be evaluated with regard to their scientific importance and technical feasibility. Further information or references might be requested. If the proposal is acceptable, the Collections Manager will decide, in consultation, which specimens, if any, may be used. The Museum reserves the right to refuse permission to allow invasive investigation of its specimens.

Invasive techniques must be agreed with the Collections Manager before the project proceeds. Museum staff can advise on suitable techniques. The Museum reserves the right to insist that the work is done within the Museum and/or by the Museum's own staff. Fees may be charged to enable the Museum provide the necessary resources and/or training.

The applicant agrees to:

- return to the Museum all remaining material including the original mount, dissected parts and any preparations,
- make permanent preparations of all remaining parts using materials and protocols specified by the Collections Manager,
- provide each permanent preparation with a direct copy of the specimen data including determination; in permanent ink on an archival quality label,
- fully cross-reference all preparations with the original specimen following the format specified by the Collections Manager,
- label prospective voucher specimens so that they may be recognised as such and linked with the published study they support,
- conform to normal loan regulations where material is to be removed from the Museum,
- identify specimens as far as possible before dissection or preparation,

- include details of vouchers, their nature and location, in published studies so that future workers can relocate them,
- acknowledge Museum staff and the use of the collection in publications involving the use of Museum specimens, and
- send to the Museum reprints of publications involving the use of Museum specimens.

For human remains, the specific procedures for securing authorisation may be determined by contacting the Keeper of Palaeontology in the first instance. Casting and other potentially damaging procedures must be discussed in advance with staff from the Palaeontology Conservation Unit and are subject to the authorisation of the appropriate collections manager.

16. *Data, information and publications resulting from research*

The results of research by Museum staff and associates are generally published in the open literature – an annual list of publications is available with the Museum’s Annual Report.

It is a condition for research access that research workers should make the Keeper of Palaeontology aware of databases, information outputs and publications that draw upon research on human remains in the Museum.

Policy Objective 5 – To give access to knowledge derived from the collection

17. *Exhibitions*

Human remains from the Museum’s holdings may on occasion be placed on public display or loaned for display if there is clearly demonstrable benefit in terms of communicating the results of science or another aspect of culture, public understanding of science, or public understanding of the role of the museum.

Any proposal to exhibit remains will be subject to approval by the relevant Keeper, following consultation and consideration of social, scientific and

related issues. Policy on loans for public exhibition is set out in section 8 above.

18. *Images and film*

Human remains may not be photographed or filmed without prior permission – policy is set out in *Curatorial Policies and Collections Management Procedures 1998* as follows:

- 5.8.6 Specimens in the collections may not be photographed, imaged, reproduced or published in any format without prior permission being obtained from the relevant Collections Manager. It will normally be a condition of granting such permission that copyright in any such images will be ceded to the Trustees of The Natural History Museum.

Photography or filming of human remains will only be permitted where there is a clearly demonstrable benefit in terms of scientific results, public understanding of science, or public understanding of the role of the Museum.

Policy Objective 6 – To be responsive to requests for dialogue on human remains

19. *Discussions on human remains*

While there is continuing scientific value in a collection of human remains, and it should continue to be the focus of active research, the Museum also recognises that the discourse on human remains in museums is framed more widely.

The Museum agrees that there is a need to enter discussions and to work with recognised institutions and organisations in those countries where there is indigenous community demand for the return of human remains from collections, and demands for a role for indigenous peoples in determining the use of remains in museums.

Such collaboration aims to provide better information on the Museum's work, to learn from the experience of others in this context, and to try to develop

mutually acceptable solutions in areas where there are conflicting views. The Museum has been active in discussions on human remains – for example, in contributing to the Museums & Galleries Commission *Guidelines for Good Practice on Restitution and Repatriation*.

There is particular interest in several countries in discussion on: return of remains to countries of origin; development of information resources (see above); systems of care for remains in the museum; and access for non-scientists to the remains. The Museum is also willing to discuss these and additional issues as they may be raised by others.

20. *Return of human remains to countries of origin*

The Museum has very limited power to return human remains to their countries of origin on a permanent basis, owing to the constraints on disposal of items from the collection. This is combined with a presumption against disposal that arises from the recognition of the scientific value of maintaining a collection of human remains as a resource for active research (see section 9 above).

21. *Access for non-scientists to human remains*

The Museum will consider requests for access to specific remains for non-scientists with established traditional links to the remains. Such access will only be granted after mutual agreement on the terms and nature of access requested. Requests for such access should be made in the first instance to the Keeper of Palaeontology.

Contact details

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Keeper of Palaeontology

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References

Natural History Museum, 1988. *Curatorial Policies and Collections Management Procedures 1998*. Museums & Galleries Commission, 2000. *Restitution and Repatriation: Guidelines for GoodPractice*.

Appendix 7: Terms of reference

1) Church Archaeology and Human Remains Working Group

Council for the Care of Churches

Cathedrals Fabric Commission

English Heritage

Terms of reference

The terms of reference for the Working Group have been agreed by CCC, CFCE and EH as follows.

The Working Group is invited to consider the issues below and to report back within a year with a draft Report. The Report will be considered by the sponsors before finalisation, and may then be subject to a six-month consultation period.

The Report should address the following issues:

1. To consider what are the issues, arising from the discovery, excavation or other uncovering of human remains, that are currently faced in practice by:
 - a. those responsible for the management of Church of England churchyards and burial grounds¹, and
 - b. archaeologists.

2. To consider what are the constraints upon the action of those responsible for the management of churchyards and upon archaeologists in dealing with these issues, including:
 - a. legal constraints, both secular and ecclesiastical,

¹ [Note in original] This refers essentially to churchyards and burial grounds currently under the Faculty Jurisdiction or the jurisdiction of a Cathedral or other Peculiar of the Church of England. However, the Working Group will also need to take account, to a greater or lesser degree in relation to ethical, scientific and archaeological issues, of churchyards and burial grounds which have been under the jurisdiction of the Church of England at some time since the Church's first establishment in the 7th century, though these may no longer be under the current ecclesiastical jurisdiction for legal or other reasons.

- b. ethical and theological constraints, and
 - c. practical constraints, including those of finance and resources.
3. To produce a brief summary of the legal position relating to the custody and disturbance of human remains, under both secular and ecclesiastical law, including an identification of issues on which the law appears to be unclear.
4. Taking account of: (i) the above constraints (but not excluding recommendations that might be achieved if modest or reasonable changes to the constraints could be brought about); (ii) the work being done by the Churches Funerals Group and by the DCMS Working Group on Human Remains; and (iii) the sensitivities of other denominations and religious organisations, to bring forward recommendations on:
- a. the principles that should underlie the treatment accorded to human remains in relation to (i) the continuing use or otherwise of churchyards for burials where the churchyard is already 'full' (including the re-use of burial grounds, the use of burial grounds for newborn infants, and the re-opening of closed burial grounds); and (ii) the siting of new buildings in churchyards to develop the worship and mission of the church;
 - b. the ethical and religious standards that should apply to the disturbance (for whatever purpose) of human remains that have received a Christian burial in a churchyard or burial ground;
 - c. issues of pastoral care relating to the treatment of disturbed human remains;
 - d. the criteria that should apply to assessing the scientific and cultural research potential and importance for study of human remains that are to be disturbed;

- e. the principles that should be followed in the archaeological mitigation of proposals that involve the disturbance of human remains;
- f. the criteria for assessing when (i) the reburial of human remains or (ii) their retention for future study should be undertaken following their disturbance;
- g. the practicalities of storing human remains, retained for study, in circumstances that respect both their scientific interest and their Christian status;
- h. what procedures or structures, if any, might be put in place in future to provide guidance and advice in particular cases in relation to the above issues;
- i. what publications, in what media, and addressed to what audiences, might now be helpful for providing general guidance in relation to the above issues;
- j. the press, TV and radio handling of the above issues.

2) Spoliation Advisory Panel Constitution and Terms of Reference

Members of the Panel

- I. The members of the Spoliation Advisory Panel ('the Panel') will be appointed by the Secretary of State on such terms and conditions as he thinks fit. The Secretary of State shall appoint one member as Chairman of the Panel.

Resources for the Panel

- II. The Secretary of State will make available such resources as he considers necessary to enable the Panel to carry out its functions, including administrative support provided by a Secretariat ('the Secretariat').

Functions of the Panel

- III. The task of the Panel is to consider claims from anyone (or from any one or more of their heirs), who lost possession of a cultural object ('the object') during the Nazi era (1933 – 1945), where such object is now in the possession of a UK national collection or in the possession of another UK museum or gallery established for the public benefit ('the institution'). The Panel shall advise the claimant and the institution on what would be appropriate action to take in response to such a claim. The Panel shall also be available to advise about any claim for an item in a private collection at the joint request of the claimant and the owner.
- IV. In any case where the Panel considers it appropriate, it may also advise the Secretary of State
- (a) on what action should be taken in relation to general issues raised by the claim, and/or
 - (b) where it considers that the circumstances of the particular claim warrant it, on what action should be taken in relation to that claim.

- V. (a) In exercising its functions, while the Panel will consider legal issues relating to title to the object (see paragraph 7(d) and (f)), it will not be the function of the Panel to determine legal rights, for example as to title;
- (b) The Panel's proceedings are an alternative to litigation, not a process of litigation. The Panel will therefore take into account non-legal obligations, such as the moral strength of the claimant's case (paragraph 7(e)) and whether any moral obligation rests on the institution (paragraph 7(g));
- (c) Any recommendation made by the Panel is not intended to be legally binding on the claimant, the institution or the Secretary of State;
- (d) If the claimant accepts the recommendation of the Panel and that recommendation is implemented, the claimant is expected to accept the implementation in full and final settlement of his claim.

Performance of the Panel's functions

- VI. In performing the functions set out in paragraphs 3 and 4, the Panel's paramount purpose shall be to achieve a solution which is fair and just both to the claimant and to the institution.

- VII. For this purpose the Panel shall:

- (a) make such factual and legal inquiries, (including the seeking of advice about legal matters, about cultural objects and about valuation of such objects) as the Panel considers appropriate to assess each claim as comprehensively as possible;
- (b) assess all information and material submitted by or on behalf of the claimant and the institution or any other person, or otherwise provided or known to the Panel;
- (c) examine and determine the circumstances in which the claimant was deprived of the object, whether by theft, forced sale, sale at an undervalue, or otherwise;
- (d) evaluate, on the balance of probability, the validity of the claimant's original title to the object, recognising the difficulties of proving such title after the destruction of the Second World War and the Holocaust and the duration of the period which has elapsed since the claimant lost possession of the object;
- (e) give due weight to the moral strength of the claimant's case;
- (f) evaluate, on the balance of probability, the validity of the institution's title to the object;
- (g) consider whether any moral obligation rests on the institution taking into account in particular the circumstances of its acquisition of the object, and its knowledge at that juncture of the object's provenance;
- (h) take account of any relevant statutory provisions, including stipulations as to the institution's powers and duties, including any restrictions on its power of disposal;

- (i) take account of the terms of any trust instrument regulating the powers and duties of the trustees of the institution, and give appropriate weight to their fiduciary duties;
- (j) where applicable, assess the current market value of the object, or its value at any other appropriate time, and shall also take into account any other relevant circumstance affecting compensation, including the value of any potential claim by the institution against a third party;
- (k) formulate and submit to the claimant and to the institution its advice in a written report, giving reasons, and supply a copy of the report to the Secretary of State, and
- (l) formulate and submit to the Secretary of State any advice pursuant to paragraph 4 in a written report, giving reasons, and supply a copy of the report to the claimant and the institution.

Scope of advice

VIII. If the Panel upholds the claim in principle, it may recommend either:

- (a) the return of the object to the claimant, or
- (b) the payment of compensation to the claimant, the amount being in the discretion of the Panel having regard to all relevant circumstances including the current market value, but not tied to that current market value, or
- (c) an ex gratia payment to the claimant, and
- (d) in the case of (b) or (c) above, the display alongside the object of an

account of its history and provenance during and since the Nazi era, with special reference to the claimant's interest therein; and

- (e) that negotiations should be conducted with the successful claimant in order to implement such a recommendation as expeditiously as possible.

When advising the Secretary of State under paragraph 4(a) and/or (b), the Panel shall be free to recommend any action which it considers appropriate, and in particular may, under paragraph 4(a), direct the attention of the Secretary of State to the need for legislation to alter the powers and duties of any institution.

Appendix 8: Draft Code of Practice for the Treatment, Care and Safe Keeping of Human Remains in English Museums and Collections*

Preface

This is a specimen Code of Practice for those museums and collections licensed by the Human Tissue Authority (HTA) to hold human remains. The Code applies to museum and ‘archival collections’ of human remains acquired before 1948. The Code will be finalised by the HTA only after full consultation with licensable museums and collections.

The HTA will be empowered to grant licences to institutions that hold human remains in accordance with this Code of Practice, and withhold or withdraw licences from institutions that do not conform to the Code. It will supervise the conditions on which any licence is granted, the penalties imposed for breach of any such requirements and for the holding of human remains without a licence, and the Code of Practice generally.

1 Introduction

- 1.1 There are tens of thousands of human remains in English museums and collections; in museums of pathology, ethnography, archaeology, anatomy, and in many university departments. They are kept by such institutions and are valued by researchers for the vital information they can provide to disciplines as diverse as medicine, archaeology and the study of human evolution.

- 1.2 These human remains include the bodies of people who lived thousands of years ago, and of those who have died within living memory. They include whole bodies, and parts of bodies as small as a single tooth or bone, or tissue samples for histological study, and artefacts made from or including body parts. Some of these remains can be identified to particular people, but most now cannot. The majority

* This document was drafted by the HRWG as a specimen code, for suggested promulgation by the Human Tissue Authority.

were acquired without permission, some in circumstances that society would now regard as abhorrent. Some of these remains are now claimed by genealogical or cultural descendants; many are not contested.

- 1.3 All these human remains were once parts of living individuals. Museums have tended to objectify them, as this makes them easier to deal with, but many museum staff would now contend that society believes that human remains need special treatment.
- 1.4 All human remains should be kept in conditions that are dignified, respectful and accord with the highest ethical standards. The same standards of care are owed to the remains, regardless of their age, origin, or the circumstances of their arrival in the collection.
- 1.5 This Code of Practice is intended to help people who work for or govern museums and collections holding human remains to operate lawfully, professionally and ethically, and to ensure that they keep and treat human remains, whatever their origin, with dignity and respect. The guidelines here promote good collections management, transparency, accountability, and communication. They assume that museums, universities and other educational institutions will continue to hold human remains, as they have in the past, to enable research, public and specialist education and the better understanding of humanity.

'You are privileged to prepare the bodies of those who have died. Treat them as though the relatives were here with you.' (Sign on the wall in the staff area of a funeral parlour quoted Lucas 2000:9)

2 Responsibility, management and policies

- 2.1 Each licensed institution must adopt, publish, and undertake to use where appropriate, policies, procedures and criteria approved by the HTA to determine claims and controversies regarding the return, retention, treatment and control of human remains. Such policies and procedures must enable it to respond consistently and in good faith to approaches from genealogical and cultural descendants concerning human remains, of whatever age, origin or provenance, and should include proposals for open consultation and dialogue with all interested parties.
- 2.2 Each licensed institution must name a professionally trained and/or experienced curator who will be designated by the HTA as responsible for ensuring compliance with the relevant conditions of its licence and with this Code. This person will normally have one or more of the following:
- a relevant degree or specialist knowledge appropriate to the collection;
 - a recognised postgraduate qualification in museum studies, and/or
 - substantial relevant experience of the principles and practice of museum operation and management.
- 2.3 Each licensed institution must also give details of the arrangements for obtaining professional conservation advice and services. Preventive and remedial conservation should be carried out or supervised by a qualified conservator trained and experienced in caring for biological materials. Freelance conservators should be drawn from the UKIC Register (<http://www.ukic.org.uk>).
- 2.4 Licensed institutions should ensure that all staff involved with the care of human remains understand the institution's policies and procedures. Some staff, particularly in general museums or collections, may object to dealing with human

remains.

- 2.5 Licensed institutions have access to a national Human Remains Advisory Panel (Advisory Panel), established by the Department for Culture, Media and Sport, consisting of independent experts appointed by the Minister for the Arts. HRAP has the power to make recommendations on all issues relating to the retention, return, treatment and control of human remains. Reference to the Panel must be consensual. Its recommendations are advisory and not legally binding.
- 2.6 Licensed institutions may establish their own 'local' advisory panels to consider requests for return, research, conservation, display or other interventions in respect of human remains. This may be appropriate where institutions are likely to be approached frequently on such issues. Such panels should have access to relevant curatorial, conservation, scientific and other appropriate expert representation drawn from outside the institution. Appointments to such panels, their terms of reference, procedures and criteria must be approved by the HTA (see 2.1 above), and they must be bound by objective standards of independence, fairness, consistency and transparency.

3 Consultation and consent

- 3.1 Genealogical or cultural descendants, members of faith groups and scientists all have legitimate concerns related to human remains collections. Real distress is likely to be caused to some of these parties if they are not consulted over the curation, use or disposal of human remains. Any institution holding human remains has a duty to respect the wishes of the dead person, where these are known, and must use its best endeavours to consult openly and pro-actively with interested parties, seeking to explore all matters of shared concern. Such matters include the identification of culturally appropriate ways of supporting and encouraging new consensual acquisitions of knowledge and of enhancing scientific access to collections in a manner compatible with the sensitive care and treatment of human remains.

- 3.2 Consultation can bring many benefits for the institution. These include:
- better contextual information and provenance for human remains in the collections;
 - the development of more balanced policies;
 - a healthier relationship with the interested parties consulted, which may open up opportunities for other forms of collaboration;
 - a higher public profile for the museum; and
 - a deeper understanding among staff of different perspectives on death and the dead.
- 3.3 Licensed institutions are expected to be pro-active in seeking out and consulting those individuals or groups known or likely to have a recognised interest in the institution's care of human remains in relation to:
- the development of general policy;
 - the formulation of general procedures and protocols; and/on
 - making decisions authorising specific actions such as resolving claims for return and requests for research.
- 3.4 Licensed institutions should establish clear claims consideration procedures and should publish their criteria for the return of human remains together with any policies or protocols relating to the care or treatment of human remains (see 2.1 above). Such procedures should enable them to respond consistently and in good faith to approaches from genealogical or cultural descendants, regardless of their origin and of the existence of relevant policies in countries of origin. Procedures should allow sufficient time for identification, checking of claims, and consideration of the concerns of all stakeholders, including alternative potential claimants.

- 3.5 Human remains in museums and archival collections fall into three broad categories, each of which is likely to involve a different level of consultation.

A *Identifiable human remains claimed by genealogical descendants or those of a comparable status*

- 3.6 Recent, identifiable human remains may have genealogical relatives or descendants with strong interests in their care and treatment. Institutions shall use their best endeavours to identify remains held in their collections, and to identify and notify close family, direct genealogical relatives, and others who have within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants in Western culture. Licensed institutions must obtain the written consent of genealogical relatives or descendants, or those of comparable status or responsibility, to retain, or perform any other act in relation to such human remains. Museums are entitled to expect claimant communities to take the initiative in bringing forward evidence of the necessary connection and lack of consent. Consultation may not be straightforward; family members may disagree about what they feel to be appropriate. The institution will be expected to comply with the wishes of the dead person which, if known, must be paramount or with the wishes of those most closely related.

B *Human remains claimed by cultural descendants or concerned parties*

- 3.7 Some human remains, particularly those of non-UK origin, may have cultural descendants who – though they do not hold a status comparable to that of close family or genealogical descendants – may require to be consulted. These communities may feel a duty of care to the dead, whose remains may have been taken without community consent; they may also feel a real need to heal following such historical events and therefore desire a say in the curation and disposition of the remains of their ancestors. Licensed institutions must use their best endeavours to consult all concerned parties whose concerns are known to them, and must take full account of their wishes and concerns, before making

any decision relative to the retention or treatment of the remains in question. While it is sometimes difficult to judge who is entitled to speak for a community or group, and cultural affiliation may be contested between different groups, there is now considerable experience, particularly in Australia and the USA, of how best to go about the process. Sources of advice and case studies of such claims are given in section 12 below, along with first points of contact agreed by a number of countries and indigenous groups. The following general points (adapted from McKeown 1997) are fundamental to successful negotiation:

- Know to whom you are talking. Work with official representatives of a community.
- Appoint an experienced and appropriately qualified official representative of your institution as their first point of contact.
- Negotiate protocol. How will the process work? What are the official channels of communication? What do both parties expect of each other? What cross-cultural factors might need to be articulated and taken into account?
- Consult as early as you can, and consult often.
- Be open about the process of negotiation.
- Be patient.
- Don't promise what you can't deliver.
- Follow through.
- Evaluate and re-evaluate.
- Keep out of claimant politics. Having ensured you are dealing with an official representative of a group with a legitimate locus, continue to do so. If the claimant community is split and riven by counter-claims, insist that the community deal with such conflict itself.
- Document the process.

C Human remains unclaimed by genealogical or cultural descendants

- 3.8 Meaningful consultation over the treatment of identified but unclaimed human remains, or of anonymous, ancient human remains without clear cultural descendants will often be impossible. But if the remains can be identified to a particular faith or community, consideration must be given to their views on appropriate care and treatment, and possible reburial or cremation. Licensed institutions must exercise their best endeavours to determine whether the dictates of conscience and decency compel such action. Institutions holding unclaimed overseas indigenous human remains must also exert their best endeavours to consult any overseas public authority charged by government with the intermediate reception and stewardship of such remains, with a view to determining whether to return the human remains to that authority, or to make other arrangements. Sources of advice and contacts are given in section 12 below.
- 3.9 Consultation may result in different kinds of care and treatment for different people; what is respectful in one culture may be distasteful to another, and attitudes to death change within cultures over time.

4 Acquisition

- 4.1 Ownership and interest. In general, and subject to significant exceptions, an institution (whether licensed or unlicensed) cannot acquire legal title to human remains, since currently under English law, no-one can own a human body (or, by extension, a part of a body). So the usual principles of acquisition that apply when a museum acquires an object cannot apply to the acquisition of human remains. The Working Group has determined that it is preferable to formulate the institution's holding in terms of rights and responsibilities arising otherwise than from formal ownership, recognising that museums which comply with their obligations have lawful possession, albeit subject to any superior rights. The licensed institution acquires certain responsibilities for safeguarding, consulting on and enabling access to human remains transferred to it, according to a formal

set of policies and protocols, in keeping with the wishes of the deceased, or their genealogical or cultural descendants (see section 2 above).

- 4.2 Acquisition by transfer. This method of acquisition may apply under interim arrangements pending the full establishment of the licensing system. Transfer of human remains to a licensed institution from another licensed institution or from an unlicensed source, such as a museum that cannot or does not wish to meet the requirements of the HTA, is legitimate, although licensed institutions have a right to refuse material offered to them. The documentation recording transfer to the licensed institution should reflect this transfer of interest and responsibility as well as the source of the remains, their history, copies of related archival material, provenance information and all other relevant attendant circumstances as far as they are known.
- 4.3 Acquisition by donation. The acquisition procedure must include a mechanism for reliably confirming that any donation is properly authorised and documented.
- 4.4 Acquisition by excavation. Once buried in England or Wales, a human body is protected in law. The Burial Act 1857 makes it a criminal offence to disinter a body without lawful authority. Development of burial grounds and the disturbance of buried remains are subject to a range of legislative controls. Where ground consecrated according to the rites of the Church of England is involved, the permission of the Church must be obtained. Remains removed in the course of archaeological excavations (including those resulting from development) may be subject to a Home Office licence or directions, which may set a timeframe for any scientific research and include requirements for eventual disposal. Transfer of human remains to a licensed institution as a result of archaeological excavation, is permitted provided that the excavation and the removal of the human remains have been conducted in accordance with legal requirements and published professional standards of archaeological investigation. Where such remains were exhumed from ground that has been consecrated or blessed, the relevant religious

authorities must have been consulted and have agreed to the subsequent disposition and treatment of the human remains.

Human remains excavated outside England and Wales may likewise be transferred to a licensed institution, provided that the excavation, removal and export of the human remains have been conducted in accordance with legal requirements of the country concerned, with the consent of relevant religious authorities, and comply with published professional standards of archaeological investigation. All authorisations must be fully documented.

- 4.5 Acquisition by purchase. Acquisition of human remains in a way that may be tainted by commercial motivation is not legitimate, and a licensed institution must refrain absolutely from such means of acquisition, irrespective of the antiquity or remoteness of the provenance.

5 Disposal and return

If consultation and/or other considerations lead to a decision to return or dispose of human remains, licensed institutions should proceed as follows.

A Identifiable human remains claimed by genealogical descendants or those of a comparable status

- 5.1 The act and method of disposal must comply with the wishes of the deceased or the deceased's kin, or those who have within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants in Western culture. This applies whether such wishes were specified at the time of donation, or are expressed subsequently through consultation. Respectful disposal of human remains rests on accordance with the cultural and religious beliefs of the individual, his or her family, or faith or cultural community. Where no mode of disposal is specified, the remains must be disposed of safely and respectfully, by incineration, in a sealed container, following the guidance given in *Strategic Guide to Clinical Waste Management* (NHS January 1994) and *Safe Disposal of Clinical Waste* (Health Services Advisory Committee September 1999).

B Human remains claimed by cultural descendants or concerned parties

- 5.2 Human remains in relation to which there exist demonstrable cultural descendants, particularly descendants of non-UK origin, may be subject to requests for return in order to dispose of those remains in a culturally appropriate way. The views and beliefs of cultural descendants on the return and disposal of human remains must be taken into account. Licensed institutions must have adopted and published and approved criteria by which such claims will be judged (see 2.1 above). Advice may be sought from the Advisory Panel or from an approved local advisory panel.
- 5.3 Some claimants may require the return of associated objects, and of catalogue and related archival information, such as photographs, along with the remains themselves, though it may be possible for the institution to negotiate to keep copies.
- 5.4 Alternatively, consultation with cultural descendants may establish that disposal to some form of ‘keeping place’, either within the museum or elsewhere, would be appropriate.
- 5.5 Through consultation, the licensed institution may negotiate the right to retain small samples of tissue for future study, including samples taken from bone, on conditions agreed with the claimants. This must, however, be negotiated openly and if samples are retained, conducted with transparency and documented.
- 5.6 Once return is agreed in principle, consultation with cultural descendants should establish how it is to be achieved in practical terms. How are the remains to be packed and transported? Who is to pay for the transfer? Who will receive the remains within the community? Are there religious beliefs that need to be accommodated? Transfer arrangements must comply with the export requirements of the UK and import requirements of the receiving country and may require the authority of the local coroner for the remains to be taken out of England and Wales.

C Human remains unclaimed by genealogical or cultural descendants

- 5.7 Many ancient human remains, for example those disinterred as a result of rescue archaeology, have been removed on the authority of a Home Office licence. The method of ultimate disposal, after study, should have been stated clearly on the licence application, and burial (or, occasionally, cremation) of the remains will be included as a condition of the licence. If the remains can be identified to a particular faith or community, their views and beliefs on the treatment of human remains before, during and after excavation must be taken into account. Some religious groups may object strongly to the disturbance of human remains, whether by design or not, and may not countenance making them the subject of study, demanding immediate reburial. Licensed institutions must have adopted and published and approved criteria by which such claims will be judged (see 2.1 above). Advice may be sought from the Advisory Panel or from an approved local advisory panel.
- 5.8 Through consultation with the relevant statutory and religious authorities, reburial or respectful storage in designated, marked sites may satisfy the requirements of the law and religious or civil tradition, and need not remove the remains altogether from the purview of scientific study in the future, should cultural and legal imperatives change in the meantime.
- 5.9 Any institution wishing to dispose of human remains must be pro-active in establishing that no genealogical or cultural descendants exist who might wish to make a claim. Some countries have established, by agreement with indigenous peoples, holding institutions to identify and care for human remains and supervise return to source communities. Licensed institutions must provide the fullest possible information to any relevant groups or organisations (see Section 12 below), and allow at least six months for a response.
- 5.10 If no claim is forthcoming, the institution may dispose of such remains through transfer, by agreement, to a licensed institution, see paragraph 4.2 above, under

the direction of the HTA. If no licensed institution is able to receive them, the management or disposal of the remains will be directed by the HTA.

6 Documentation and public access to information

Documentation in the public domain

- 6.1 Licensed institutions must exercise their best endeavours to provide reasonable access to collections and collections information, subject to consultation with interested parties. Where institutions are subject to the provisions of the Freedom of Information Act 2001, the following information should be included in the institution's publication scheme: the volume of human remains held; an inventory of the remains held; their condition; the circumstances of their acquisition; whether any relevant consent was given; the terms and focus of any consent; the circumstances of such consent; past experience of and response to claims; and details of the treatment and usage of the remains.
- 6.2 All licensed institutions must devise and publish a plan to improve and develop their documentation of human remains, especially where these are subject to claims. This information should be made publicly available in the form of a printed inventory, an accessible electronic database or online catalogue, unless consultation with relatives and descendants specifically demands otherwise.
- 6.3 The catalogue should provide clear links to related files maintained by the licensed institution, which will contain relevant correspondence, transfer and necessary licence documentation, further contextual details and key publication references. The normal presumption should be that all such information – however incomplete or disorganised – will be publicly accessible.
- 6.4 Licensed institutions holding collections of human remains from outside the UK must notify cultural descendants and/or the governments of the countries concerned, where these are actively seeking return, and keep a record that they have done so.

- 6.5 It is recommended that accession numbers are attached to human remains in such a way as to minimise the risk of loss or disassociation, but marking directly on bone or other remains is ethically undesirable, as it objectifies the remains. In complying with these responsibilities, licensed institutions must exercise their best endeavours to respect all reasonable considerations of decency, privacy, and confidentiality, and to honour the sensitivities of others about the public exposure of sacred/secret material.

Sensitivity to controlled or restricted access

- 6.6 The documentation on identified human remains may sometimes contain linked information about particular individuals or their families, and this sensitive personal information should normally be held securely, and always in accordance with the provisions of the current legislation affording protection to such data. Consultation will establish the extent to which disclosure of such information to the public is desirable. The institution must honour the wishes of the deceased and/or his/her next of kin.
- 6.7 The documentation of human remains with cultural descendants may involve very similar sensitivities and if so will likewise necessitate consultation. Institutions with such collections should consult with cultural descendants at an early stage. Where accurate documentation requires further research, for example in order to ascertain cultural and geographical provenance, it may be appropriate to involve or employ members of likely source communities in helping to research and document collections. Consultation should also establish whether there are certain categories of information to which access should be restricted. For example, some indigenous groups may wish to restrict access to photographs of human remains. Where such sensitivities exist, and particularly in museums and institutions with general collections, it may be appropriate to keep human remains records separately from other collections information.

- 6.8 Where, as a result of consultation, it is agreed that certain information should not be made public, the reasons and criteria should be documented and made public. For instance, some museums have adopted policies that specifically preclude or restrict access to images of human remains by the media.

7 Treatment of human remains

- 7.1 Every aspect of the treatment of human remains should be consistent with the highest professional standards. This obligation applies whether or not the remains are subject to a claim for their return or a request for special treatment.
- 7.2 Where human remains are identifiable, claimed by genealogical relatives or descendants, or by those who have within the deceased person's own culture a status or responsibility comparable to that of close family or direct genealogical descendants in Western culture, and where general consent has not been obtained for methods of treatment, the consent of relatives or descendants must be obtained, in writing, for all aspects of their care and treatment of the remains under the headings in sections 8–11 below.
- 7.3 Where human remains are claimed by cultural descendants, institutions should consult descendants on all aspects of their care and treatment under the headings in sections 8–11 below. Wherever possible the institution should adopt practices that can reasonably be considered culturally appropriate in the circumstances.
- 7.4 Licensed institutions must have adopted and published and approved criteria by which such requests for special treatment will be judged (see 2.1 above). Advice may be sought from the HRAP or from an approved local advisory panel.
- 7.5 Decisions and the reasons for making them should be made publicly accessible, and all use of human remains recorded.

8 Storage, care and preventative conservation

- 8.1 The mere act of holding human remains will irrevocably result in their progressive degradation through the continuing natural processes of decay, which the licensed institution will attempt to mitigate through the application of techniques of preventive conservation. Such methods can only slow down but not arrest decay.
- 8.2 Licensed institutions should treat the human remains they keep with respect. As a starting point this will entail meeting basic standards of collections care, as outlined in *Benchmarks in Collection Care* (Winsor, 2002). Human remains should be kept in suitably safe, secure, watertight premises, with stable, monitored environments, which are kept clean and regularly checked for pests, damaged and leaking storage containers and other potential threats. Appropriate health and safety regulations, such as those concerning the control of substances hazardous to health, must be complied with.
- 8.3 These basic standards may be altered or strengthened as appropriate as a result of consultation with genealogical or cultural descendants or relevant faith organisations. For example, while in some cultures darkness and privacy would be regarded as essential to the maintenance of a respectful environment for human remains, in others contact with light and the living are thought necessary. Current UK museum practice favours the use of inert packing materials, but other cultures may require traditional organic materials.
- 8.4 It may be important to give each individual a separate storage box or container, so that their remains are kept together. In general museums it may be necessary to create a separate storage area for human remains, to create conditions likely to engender respectful treatment. Alternatively consultation may result in the creation of off-site stores or 'keeping places' where care, treatment and access policy is agreed with genealogical or cultural descendants or relevant faith organisations. Everyone expected to work with human remains – security,

technical, maintenance and educational staff as well as curators and conservators – should ideally be involved in framing institutional policy and procedures, and should in any case be fully trained to carry them out.

9 Remedial conservation, research and learning programmes

- 9.1 All uses by the licensed institution of the human remains in their care will inevitably cause attrition whether through handling, accidental damage or intentional removal of material for study.
- 9.2 Here the concerns of descendants and those of scientists, researchers and educators are very similar. The integrity of human remains is important in many belief systems, and also crucial to future research and study. For example, handling human remains may contaminate ancient DNA with modern and limit or destroy the value of future sampling. The principle of minimum intervention should always apply, avoiding treatments that will contaminate or degrade human remains. Analytical techniques that involve the destruction of any part of the human remains entrusted to the care of the licensed institution should only be applied according to strict, published protocols and policies.
- 9.3 Some cultural groups may require that human remains are not handled except for the purpose of establishing provenance, and thereafter only with the involvement and consent of cultural descendants. Conservation practice may have to be modified as a result of such consultation.
- 9.4 Decisions on such requests should take account of all aspects of the proposed work, including the purpose of the research, where and how the work is to be carried out, the techniques – including photography – to be employed, and how it will be published.

10 Exhibition and interpretation

- 10.1 A museum must always have a clear interpretative purpose for any display. The ethical principles and cultural sensitivities involved in the display of human remains make such objectives all the more important. The efficacy of interpretation and the acceptability of display will be immeasurably improved through formative evaluation, which should involve careful consultation with target audiences, genealogical and cultural descendants. Learning outcomes should be identified, tested and demonstrable as well as being socially relevant, culturally acceptable and kept under review.
- 10.2 Most pathology museums are not open to the general public and display human remains only for medical students or to booked groups. Some general museums have taken the decision not to display human remains, or images of human remains, to the public. But displays of ancient, unclaimed human remains can be seen in many museums.
- 10.3 There may be many valid reasons for using human remains in displays: to educate medical practitioners, to educate lay people in science and its history, to explain burial practices, to encourage reflection, or (on occasion) to shock. Museums can be places where grief, violence, suffering and fatality can be expressed and addressed in beneficial ways.
- 10.4 Museums must always be on their guard against creating displays of human remains that function as little more than gratuitous attractions for the morbidly curious, and must refrain absolutely from profiting from such popularity.
- 10.5 Those planning displays including human remains should consider how best to prepare visitors to confront them respectfully, or to warn those who may not wish to confront them at all. Those planning to use human remains in handling sessions should also consider these issues, together with the risk of damage handling

inevitably poses (see section 9 above).

Consultation with different faith groups may be appropriate. It may be necessary to consider related issues such as the presentation and interpretation of nudity, sexuality and disease.

- 10.6 Display conditions, like storage conditions, should be safe, secure and watertight with stable, monitored environments, which are kept clean and regularly checked for pests, damaged and leaking storage containers and other potential threats. Appropriate health and safety regulations, such as those concerning the control of substances hazardous to health, must be complied with. Organic materials are light sensitive, and light levels should be maintained in accordance with recognised standards, with UV light excluded as far as possible. These basic standards may be altered or strengthened as a result of consultation with genealogical or cultural descendants, or relevant faith organisations.

11 Loans

- 11.1 Licensed institutions may receive requests for the loan of human remains for exhibition, research or study elsewhere. It may be necessary to review systems for considering and approving such loans, and to adapt standard loan conditions, to ensure that human remains on loan for whatever purpose will be treated with the same standard of respect and level of care when off site. At a basic level this will include checking site facilities reports in advance of the loan, condition reporting at agreed stages, and receipts signed by the curator and authorised staff at each venue.
- 11.2 In general, licensed museums should only loan to, and receive loans from, other licensed museums. Equivalent considerations should govern the loaning of human remains to museums located in areas where the licensing system for England and Wales does not operate.

12. Sources of advice and funding

USA

Under the Native American Graves Protection and Repatriation Act (NAGPRA), all federally recognised tribes should have an official NAGPRA representative who acts as the contact person for enquiries about cultural property and human remains for the tribe. For a list of these contacts:

<http://web.cast.uark.edu/other/nps/nacd/> Native American consultation database: US Native American tribal contacts for NAGPRA consultation
<http://www.cr.nps.gov/nagpra/INDEX.HTM> National NAGPRA home page, with other practical information on US repatriation

<http://www.uiowa.edu/~anthro/reburial/repatriation.htm> Dr Larry Zimmerman's home page for issues to do with repatriation and reburial; mostly US but some overseas material

Canada

A database of First Nations communities is available on the website of the Department of Indian and Northern Affairs:

<http://sdiproduct2.inac.gc.ca/FNProfiles/>

New Zealand

The Museum of New Zealand Te Papa Tongarewa coordinates the formal repatriation project on behalf of the New Zealand Government. The Repatriation Project team facilitate the return of kōiwi tangata Māori to New Zealand and subsequently to the Māori communities of origin.

Further information about the project can be found at

www.tepapa.govt.nz/TePapa/English/AboutTePapa/CommunityRelationships/Repatriation/

Australia

The Office of Indigenous Policy Coordination (OIPC) is the lead agency in Australia for the repatriation of Australian Indigenous remains. An OIPC repatriation officer is based at the Australian High Commission in London. Further information can be found on the following websites:

Australian High Commission, London
www.uk.embassy.gov.au

Office of Indigenous Policy Coordination
www.oipc.gov.au

13 Definitions

The term **human remains** is taken here to include:

- osteological material (whole or part skeletons, individual bones or fragments of bones, teeth);
- soft tissue including organs, skin, hair, nails, etc (preserved in spirit, wax, or dried/ mummified);
- slide preparations of human tissue (for histological study);
- artefacts that are made from or include any of the above.

Exclusions: anatomical models and other artefacts representing human anatomy.

source communities or communities of origin: communities from which human remains originated.

indigenous peoples/indigenous communities: following UNESCO work on the draft declaration on the rights of indigenous peoples, we define these peoples as distinct cultural groups having a historical continuity with precolonial societies that developed on their territories. These peoples may (or may not) form minority or marginalised sectors of society within larger nation states.

relatives and genealogical descendants: biological, social, and adoptive kin or family. Persons defining themselves by a demonstrable social or biological relation to the deceased, which they express as a form of kinship. The tie may be demonstrated through birth, marriage, adoption, family membership, or some other arrangement through which the parties share a close identity of a kinship kind, either within or across generations.

cultural descendants: persons of the same cultural group or who are the common descendants of a historical culture, even though they may not have or recognise family ties. Such individuals are bound together through the distinctive nature of their practices and values, which may include a name (or set of names) or language or tradition or heritage, or other common reference points. These reference points may be of variable time depth, but inheriting and practising them gives persons a common identity within the group and links current and previous generations.

14 References and sources drawn on for these guidelines

Buckley, 1999. *The Treatment of Human Remains*. Technical paper for archaeologists. Dublin: Association of Professional Archaeologists.

Butler, C., 1994. Sensitivities and practical considerations in the return of human remains, in Bray, T. L. and Killion, T. W., eds., *Reckoning with the Dead: The Larsen Bay Repatriation and the Smithsonian Institution*. Washington DC: Smithsonian Institution Press.

Clavir, M., 2002. *Preserving What Is Valued: Museums, Conservation and First Nations*. Vancouver: University of British Columbia Press.

Department of Health, 2002. *Human Bodies, Human Choices: The Law on Human Organs and Tissue in England and Wales*. Consultation report 28090, July 2002 (www.doh.gov.uk).

Flynn, G. and Hull-Walski, D., 2001. Merging traditional indigenous curation methods with modern museum standards of care, in *Museum Anthropology* 25(1): 31-40.

Hicks, M., ed., *Collected Papers from Exhibiting Human Remains*. Papers from a seminar presented by Health and Medicine Museums at Powerhouse Museum Sydney, 12 May 2000.

Historic Scotland, 1997. *The Treatment of Human Remains in Archaeology*. Operational Policy Paper 5.

Lucas, B., 2000. Exhibiting human remains: what are the ethical issues?, pp 5–13 in Hicks, M., op.cit.

McKeown, T., 1997. Principles of consultation, in *Common Ground* 2 (3/4): 26-7.

Museum Documentation Association, *Standards in Action: Working with Archaeology*.

Museum Ethnographers Group, 1994. Professional guidelines concerning the storage, display, interpretation and return of human remains in ethnographical collections in United Kingdom museums, in *Journal of Museum Ethnography* 6.

Museum Victoria, 1994. *Management of Aboriginal Skeletal Remains*.

Museums & Galleries Commission, 1992. *Standards in the Museum Care of Archaeological Collections*. London: MGC.

Museums Association, 2002. Code of Ethics for Museums. London: Museums Association (www.museumsassociation.org).

Natural History Museum, 2002. *Policy on Human Remains*.

Parker Pearson, M. Towards a code of ethics for human remains in the British Isles, unadopted proposal, from *Ethics and the Dead in British Archaeology*, in *The Field Archaeologist* 23: 17-18.

Pathology Curators Group, 2002. Draft code of practice for pathology museums, in *Retained Organs Commission: A Consultation Document on Unclaimed and Unidentifiable Organs and Tissue and a Possible Regulatory Framework*. London: Retained Organs Commission, February 2002, Appendix 8 (www.nhs.uk/retainedorgans/).

Pye, L., 2001. Caring for human remains: a developing concern?, in Oddy, A. and Smith, S., *Past Practice, Future Prospects*. London: British Museum Occasional Paper no. 145.

Swain, H., 2002. The ethics of displaying human remains from British archaeological sites, in *Public Archaeology* 2: 95-100.

Walker, P., 2002. Bioarchaeological ethics: a historical perspective on the value of human remains, pp3–39 in Katzenberg, M. A. and Saunders, S. R., eds., *Biological Anthropology of the Human Skeleton*. Wiley-Liss Inc.

Winsor, P., 2002. *Benchmarks in Collection Care*. London: Resource (www.resource.gov.uk).

Appendix 9: Working Group on Human Remains submissions

WGHR S1- Studying Native America: Problems and Perspectives (1998), Chapter 14
“*Who Owns our Past?*” Russell Thornton, Native American Repatriation
Review Committee.

WGHR S2- *“Indigenous Australian People, Their Defence of the Dead and Native
Title”*. Paul Turnbull, Associate Professor of History, James Cook
University.

WGHR S3- Submission from Isabelle Coe and Gregory Young, Aboriginal Tent
Embassy, The Hage, Holland.

WGHR S4- Papers from “Exhibiting Human Remains” seminar, Sydney. Megan
Hicks, Hon. Secretary, Health and Medicine Museums. (A special Interest
Group of Museums Australia Inc.

WGHR S5- Submission with attachments from Dawn Casey, Director, National
Museum of Australia.

WGHR S6- *“The Ethics of Displaying Human Remains from British Archaeological
Sites”*. Hedley Swain, Head of Early London History and Collections,
Museum of London.

WGHR S7- Submission by David C. Devenish, Hastings, Sussex.

- WGHR S8- *“Digging Up God’s Acre”* Masters Dissertation by Colin D S Hewat.
- WGHR S9- *“The Privacy of Tutankhamen – utilising the genetic information in stored tissue samples”*. Professor Soren Holm, Professor of Clinical Bioethics, University of Manchester.
- WGHR S10- Policy Document from The National Museums of Scotland.
- WGHR S11- Submission from Peter Pickering, London.
- WGHR S12- Submission from Dr Joseph Evans, Archaeological Officer, Council for the Care of Churches, on behalf of the Archbishops' Council of the Church of England.
- WGHR S13- Submission from Dr S A Mays, English Heritage and University of Southampton.
- WGHR S14- Submission from Kunani nihipali, head of Hui Malama I Na Kupuna O Hawai'i Nei (Group caring for the ancestors of Hawai'i).
- WGHR S15- Letter from Phillip L Walker, Vice President, American Association of Physical Anthropologists together with *“Bioarchaeological Ethics: A Historical Perspective on the Value of Human Remains”*.
- WGHR S16- *“A F R Wolleston and the “Utakwa River Mountain Papuan” Shulls”*. Chris Ballard, fellow, The Australian National University.

- WGHR S17- "Murihiku Resolution of Maori Human Remains Management" and Southland Museum and Art Gallery policy document, Karl Gillies, Southland Museum and Art Gallery.
- WGHR S18- Submission from Dr Paul Tapsell. Director Auckland War Memorial Museum.
- WGHR S19- Submission from Simon Ward, Secretary of The Association of Diocesan and Cathedral Archaeologists.
- WGHR S20- Submission from Len Pole, Chair, Museum Ethnographers Group.
- WGHR S21- Submission from Piers Davies, Convenor, Auckland Sub Branch, Cultural Heritage Law Committee of the International Law Association.
- WGHR S22- Submission from U M O'Neil, London.
- WGHR S23- Submission from Brian Connell and William J White, Museum of London Specialist Services.
- WGHR S24- "Curation of Human Skeletal Remains – The Perspective of a Higher Education Research and Teaching Institution". Dr Holger Schutowski, Head of Department of Archaeological Sciences, University of Bradford.
- WGHR S25- Submission from Professor Margaret Cox, British Association for Biological Anthropology and Osteoarchaeology.

- WGHR S26- Submission from M J Lowe, Deputy Secretary, The British Medical Association.
- WGHR S27- Submission from Martin Petchey (Oxford Archaeological Associates Limited).
- WGHR S28- Submission from Dr Richard Sullivan (Head of Clinical Programmes and Research Fellow UCL, Scientific Department, The Cancer Research Campaign).
- WGHR S29- Submission from Neil G W Curtis, Senior Curator, Historic Collections Marischal Museum, University of Aberdeen.
- WGHR S30- "*Arches of radii, corridors of power: reflections on current archaeological practice*". Colin Pardoe, Australian Institute of Aboriginal and Torres Strait Islander Studies.
- WGHR S31- Submission from Michael O'Hanlon, Director, Pitt Rivers Museum.
- WGHR S32- Submission from Moira Simpson, Flinders University of South Australia.
- WGHR S33- Submission from Geoff Clark, Chairman, Aboriginal and Torres Strait Islander Commission.
- WGHR S34- Submission from Dr Graham Durant, Hunterin Museum and Art Gallery, University of Glasgow.
- WGHR S35- Submission from Michael Mansell, Legal Manager, Tasmanian Aboriginal Centre.

- WGHR S36- “Care of Cultural Property”, essay by Anna-Marie White, with comment from Maui Dalvanus Prime, Director of Mokomokai Education Trust.
- WGHR S37- Submission from Professor Rosalie David, Keeper of Egyptology, The Manchester Museum.
- WGHR S38- Submission from Dr Norman Macleod, Keeper of Palaeontology and John Jackson, Science Policy Coordinator, Natural History Museum.
- WGHR S39- Submission from Dr Cressida Fforde, Institute of Archaeology, UCL.
- WGHR S40- Submission from Jackie Tindill (University of Queensland, Australia).
- WGHR S41- Submission from Dr Peter Stone, Chief Executive Officer, World Archaeological Congress, International Centre for Cultural and Heritage Studies, University of Newcastle upon Tyne.
- WGHR S42- “Management of Aboriginal Skeletal Remains”. Policy Document from the Museum Victoria.
- WGHR S43- Submission from Professor Simon Hillson Institute of Archaeology, University College London.
- WGHR S44- Submission from The Royal College of Surgeons of England.
- WGHR S45- Submission from Te Papa Tongarewa, Museum of New Zealand.
- WGHR S46- Submission from Lyndel V Prott, Director, United Nations Educational, Scientific and Cultural Organisation.

WGHR S47- Submission from Anna Southall, Director, National Museums & Galleries of Wales.

Appendix 10: The Native American Graves Protection and Repatriation Act (NAGPRA): A detailed analysis

The legal provisions of NAGPRA

1. NAGPRA develops a systematic process for determining the rights of lineal descendants, Indian Tribes and Native Hawaiian Organisations to four categories of objects which are:
 - human remains;
 - funerary objects;
 - sacred objects; and
 - objects of cultural patrimony.
2. The legislation applies to collections of most American remains and associated funerary objects held by Federal Agencies in federally funded museums and universities or in the possession of any institution, whether State or Local Government, which receives Federal funds or objects found on Federal or tribal land.
3. It imposes a duty upon any Federally funded museum or other institution to compile a summary of collections based upon available information and an inventory of human remains and associated objects in its possession or control and to identify the cultural and geographical association of each object. The purpose is to 'facilitate repatriation' by providing clear descriptions of the human remains and associated objects and establishing the cultural affiliation between those objects and present day Indian Tribes and Native Hawaiian Organisations.
4. The legislation imposes a positive duty on museums or Federal Agencies to repatriate human remains or associated objects to a lineal descendant, Indian

Tribe or Native Hawaiian Organisation if a request or claim for return has been made. Whilst the duty becomes imperative only if a claim is made, the Act does require museums or Federal Agencies to adopt a proactive approach to remains in a collection and provide certain information to those whom they believe may be interested in their claim even if one has not actually been made.

5. If remains are inadvertently excavated the finder must stop working on the site, notify the appropriate Indian Tribe or Native Hawaiian Organisation and secure the site. If the excavation is intentional then archaeologist must consult with the Tribe prior to the excavation commencing if it is reasonable to assume that a planned activity may result in excavation of remains. The excavation of human remains, funerary objects or other objects covered by the Act are only permitted if they follow the requirements of the Archaeological Resources Protection Act (ARPA) and its implementing regulations which require those excavating to obtain a permit before commencing work. Proof of consultation and consent with the relevant Tribe or Organisation is mandatory and must be available before a permit will be issued.

6. Sections 5 and 6 of NAGPRA set out the duties on each museum and Federal Agency to document and disclose details of items in their collection. Section 5 deals with the possession or control of human remains and associated objects and requires museums or Federal Agencies to compile an inventory of such objects and list the geographical and cultural identity of each. Inventories should be completed after consultation with Tribal and Native Hawaiian Organisation officials and traditional religious leaders within five years. The purpose of the inventory is to ‘facilitate repatriation by providing clear descriptions of human remains and associated objects and establishing the cultural affiliation between these objects and present day Indian Tribes and Native Hawaiian Organisations’. Museum and Federal officials must consult with the lineal descendants of any individuals whose remains and associated objects are likely to be subject to the inventory provisions or likely to be culturally affiliated and from whose original

- land the human remains/associated objects originated.
7. Section 6 deals with unassociated funerary objects, sacred objects and objects of cultural patrimony and requires the museums and Federal Agencies which have possession or control to provide a written summary of the objects.
 8. Section 7 provides for the return of human remains, associated and unassociated funerary objects, sacred objects and objects of cultural patrimony identified pursuant to Sections 5 and 6. It calls for all returns to be completed in consultation with a requesting descendent, Tribe or Native Hawaiian Organisation.
 9. The remains must be repatriated expeditiously if a claim is made subject to the following criteria: Cultural affiliation has been established and the object falls within the definitions outlined in the Act. Repatriation must take place within 90 days of receipt of a written request and not less than 30 days after the publication of Notice of Intent to Repatriate.
 10. This section has a provision that the Federal Agency or museum must share its information with the requesting descendent, Tribe or Native Hawaiian Organisation to assist them in making a claim and establishing their right to possession to the object.
 11. NAGPRA does not ignore the benefits of scientific research on remains and provides that if an item is needed for a specific scientific study, the outcome of which 'would be of major benefit to the United States', the item may be retained but must be returned within 90 days of completion of the study. If there are legitimate competing claims for any cultural item then the Federal Agency or museum can also retain the item until the requesting party or the Courts decide who the appropriate Claimant is.
 12. Once the Claimants have been identified and repatriation agreed then the remains or objects must be accomplished by the museum or Federal Agency in

- consultation with the requesting Claimant to determine the place and manner of the repatriation. The Claimant recipient must be informed of any presently known treatment of the human remains or objects with pesticides, preservatives, or other substances which represent a potential hazard to the object or to the person handling them.
13. NAGPRA further assists both the potential Claimants and the Federal Agencies and museums in cooperating with each other and working together to ensure that the spirit of community that the Act promotes can be achieved. Section 10 of the Act provides for grants to museums to assist in the inventory and summary requirements of the Act, and also provides grants to Tribes and Native Hawaiian Organisations to assist in the return of items covered by the Act.
 14. This desire to promote cooperation is also evident in the dispute resolution clause which ensures that any party who wishes to contest an action taken by a museum, Federal Agency, Tribe or Organisation with respect to repatriation or disposition of the remains/objects is encouraged to do so through informal negotiations to achieve 'a fair resolution of the matter'. The Act sets up a review committee to monitor and review the implementation and provisions of the Act, and the services of this committee can be used to try to achieve formal resolutions of disputes which are not resolved by 'good faith negotiations'. These actions may include convening meetings between the parties, making advisory findings as to contested facts and making recommendations to the disputed parties or to the secretary as to the proper resolution of disputes.
 15. The Act itself is clear in that it does not intend to restrict access to any Court or limit rights to individuals, Tribes or Organisations to access to the law. It confirms that the United States District Courts retain jurisdiction over any action brought that alleges a violation of the Act.

The benefits of NAGPRA

16. More than a decade of NAGPRA activity has demonstrated real benefits to the museum profession from such work; it has also raised real problems. In reviewing these, and the lessons learned overall from NAGPRA, we recognise that NAGPRA bears only on Native American remains, while our terms of reference require us to take a broader view, and that NAGPRA compels repatriation within certain categories of artefact.
17. Since 1990, thousands of human remains and associated funerary objects, and smaller numbers of culturally significant artefacts, have been repatriated from US museums to Native American people. Figures are not available on the numbers of human remains returned, although NAGPRA officials clearly expect all culturally identifiable remains (out of an estimated pre-1990 total of 200,000 individuals represented by remains in US museum collections) to be returned from museums, along with some culturally unidentifiable remains to be returned to regional alliances of tribes.¹ Notices of Intent to Repatriate, the final administrative step before return, have been published for 50,887 unassociated funerary objects, 898 sacred objects, 237 objects of cultural patrimony, and 383 items fitting both sacred and cultural patrimony definitions.² The vast majority of human remains returned have been buried or cremated.

1 C. Timothy McKeown, 'Implementing a "true compromise": The Native American Graves Protection and Repatriation Act after ten years, in Cressida Fforde, Jane Hubert and Paul Turnbull, eds., *The Dead and their Possessions: Repatriation in Principle, Policy and Practice* (2002) London: Routledge pp 117 and 124, and M. Simpson, *Making Representations: Museums in the Post-Colonial Era*, (2001) London: Routledge p 285.

2 McKeown, op. cit.p 124.

18. Given the historical and political pressures involved, it is only very recently that collaborative research efforts – allowing research on human remains followed by reburial or cremation – seem to be gaining strength. Some artefacts have also recently been legally repatriated but permitted to remain in the physical care of museums; other artefacts have gone to tribal museums or ritual practitioners, or been buried or permitted to decay naturally.
19. Three extremely important benefits appear to have emerged as the result of implementing NAGPRA: healing for Native American peoples; consultation and dialogue between Native Americans and museums; and improved documentation for museum collections.
20. The ability to honour one's duty to ancestors by according their remains proper burial has been extremely important to Native Americans. For the northern Cheyenne, for instance, who claimed from the Smithsonian the remains of ancestors massacred by the US Army at Antelope Creek in 1877, burying their dead involved mourning for the individuals involved as well as resolving anger at the massacre and its aftermath, during which the bodies of their ancestors were collected for scientific study. This repatriation did much to reinforce the pride and strength of the Cheyenne nation today and for the future.³ Being recognised by museums and scholars as having legitimate interests in ancestral remains and possessing valuable knowledge about museum collections has also been empowering for Native Americans.

The emphasis on consultation

21. Tribal consultation with museums is part of the NAGPRA process. Such meetings, which bring tribal representatives into museum storerooms and archives, have done a great deal to bridge the historic gulf between collections of Native materials and living members of the tribes from which the collections come. They have also functioned as a collective education process for museum professionals who have learned much about the cultural meanings and histories of

collections, of the importance of historic materials to Native peoples today, and of cultural protocols for showing respect.

Inventories and documentation

22. Having to provide cultural inventories of Native American collections has greatly improved museum record-keeping and generated a wave of research. As a result of this process many museums now have computerised databases that incorporate all historical information and new research on the collection, and which without NAGPRA would have taken decades longer to achieve.⁴ Much new information, and many corrections of misinformation on old records, have arisen as the result of tribal consultation and visits (Isaac, personal communication to Peers, 2000). New research on collections to determine their cultural affiliation for inventorying has also sparked a great deal of new intellectual activity.

Challenges and burdens

23. NAGPRA has not achieved these benefits without considerable problems. Given that it will result in the loss of human remains from museum collections, NAGPRA does impose constraints on certain kinds of scientific research

3 R. Thornton, 'Who owns our past? The repatriation of Native American human remains and cultural objects,' in R. Thornton, ed., *Studying Native America: Problems and Prospects* Madison: University of Wisconsin pp 385-6.

4 For example, B. Isaac, 'Implementation of NAGPRA: the Peabody Museum of Archaeology and Ethnology, Harvard, in Fforde, et al., op.cit. pp 164-5.

now and in the future.⁵ As a result, it has also sharpened differences between Native communities and elements of the scientific community, and within the scientific community itself.⁶

24. Pragmatically, the difficulty of meeting deadlines for completion of cultural inventories by museums was underestimated and the process underfunded by legislators.⁷ Few items in collections are well provenanced; establishing provenance requires time and skilled research, which is expensive. Delays in publishing guidelines for interpreting the legislation, in responding to correspondence and queries, and in publishing notices on the part of the regulatory office in Washington caused uncertainty and stress for all parties.⁸ Even the question of whether the museum or the Tribe pays for the cost of repatriation is unclear in the legislation.⁹ Finally, the knowledge and skill required by museums to consult adequately with tribal groups over historical and prehistoric human remains is considerable, and often painfully acquired: 'The remains of nine Flathead individuals resulted in consultation with eight tribes ... Each consultation demands specific knowledge of territory and custom; the process may be likened to having diplomatic relations with hundreds of nations.'¹⁰

5 Francis P. McManamon, 'Repatriation in the USA: A decade of federal agency activities under NAGPRA,' in Fforde, et al., op.cit. p 141.

6 *ibid.* p 143-4.

7 Isaac, op. cit. p163; McManamon, op. cit. p 140.

8 Isaac, op. cit. p 165.

9 Isaac, op. cit. p 166.

10 Isaac, op. cit. p 165.

25. Other problems involve inadequate guidance within the legislation for the disposition either of culturally unidentifiable human remains or of funerary objects associated with them; these guidelines are only now being produced.¹¹ Most problematic of all are issues of ancient or socially complex remains where there are no clear genealogical or cultural descendants to claim them, such as the ancient Kennewick Man remains, and several fiercely disputed cases in the Southwest where multiple communities legitimately claim the same ancient remains.¹²

11 Isaac, op. cit. p 163 and 165.

12 David Hurst Thomas, *Skull Wars: Kennewick Man, Archaeology, and the Battle for Native American Identity* (2000) New York: Basic Books. [On Kennewick Man see also the links at the National Parks Service website, <http://www.cast.uark.edu/products/NAGPRA/>]; Isaac, op. cit. p 166.